Lin Wen-Chih & Anor v Pacific Forest Industries Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02 (W)-1466–07 OF 2018
LAU BEE LAN, NANTHA BALAN AND SUPANG LIAN JJCA
23 OCTOBER 2020

Contract — Claim for monies owing — Limitation — Whether plaintiff's claim was barred by limitation — Whether s 14 of Sabah Limitation Ordinance ('the SLO') did not apply to suspend computation of time for purposes of limitation — Whether s 14 of SLO only applied where court (whether in the first instance or in the appeal) had no jurisdiction to adjudicate the matter before it — Whether defendants were not estopped from raising limitation because they had not represented or conducted themselves in a way that induced plaintiff to act to its detriment limitation-wise — Whether trial judge erred in dismissing defendant's plea of res judicata — Whether defendants were not precluded from raising res judicata again during the trial even though their earlier attempt to strike out the suit on that ground had failed — Whether dismissal of striking-out application did not mean issue which was the subject-matter of the application had been determined with 'finality'

The first respondent ('R1'), which operated a timber sawmill, owed the appellants RM10,134,000 as at the end of August 1996 with interest continuing thereon at 11%pa on monthly rests calculated day to day ('the debt'). In a letter of acknowledgement ('LOA') to the appellants, R1 undertook to repay the debt by selling its timber products to the appellants at prices consistent with the prevailing market price in four shipments over a ten-month period from 12 November 1996 until 11 September 1997 ('the set off period'). The sale prices for the four shipments were to be 'deducted from and set off' against the debt. The LOA also stated that if the appellants cancelled or rejected any order on the ground that R1 had failed/refused to fulfill any purchase order or had failed to replace any defective products that had been supplied, then R1 would 'pay cash in lieu of such timber products' and such cash payment would be set off against the debt. The second respondent ('R2') guaranteed R1's repayment of the debt in the manner specified in the LOA. After ordering and receiving one shipment of timber products from R1 in early September 1997, the appellants sued the respondents ('the 1997 Suit') for payment of the balance of the debt in the sum of RM6,223,241 (in a letter dated 10 November 1997 to the appellants' solicitor, R1 maintained that the balance of the debt was only RM5,431,454.87). R1 disputed the 1997 Suit, inter alia, on the ground that the debt had been discharged on account of the appellants' failure to make the requisite four purchase orders within the set off period. For that

same reason, the trial judge held that the appellants' claim was 'premature' and dismissed the 1997 Suit. The Court of Appeal ('COA') set aside that verdict and gave judgment for the appellants. The COA noted that out of four attempts made by the appellants to buy R1's timber products, only one transaction was concluded because the parties could not agree on the pricing (the appellants alleged that R1 quoted prices that were too high and inconsistent with the prevailing market price) and since the parties could not agree on such a fundamental term, and there was no provision in the LOA to settle the issue, the LOA had been frustrated. On 7 September 2009, the Federal Court ('FC') set aside the COA's decision and reinstated the High Court's verdict holding that the COA should not have considered the issue of frustration when it was not pleaded. Three years after the FC's decision (and 15 years after the set off period had expired), the appellants placed a fresh order for timber products from R1. R1 ignored the order. The appellants then cancelled the order and demanded immediate cash payment of RM6,223,241 from the respondents. When the demand was also ignored, the appellants, on 10 May 2013, sued the respondents ('Suit 2013') for payment of RM6,223,241 plus accrued interest amounting to RM10,635,945.65. In that suit, the appellants claimed that R1 had deliberately frustrated the due performance of the debt-settlement arrangement in the LOA by either refusing to sell its products to the appellants or by quoting prices which were way above the prevailing market prices. The appellants also contended that by refusing to settle the balance of the debt, the respondents had unjustly enriched themselves. The respondents applied to strike out Suit 2013 on grounds of limitation and res judicata — ie, that the latest purchase order was a sham to revive a debt which had become time-barred under Sabah's Limitation Ordinance ('the SLO') and also that the 2013 Suit sought to re-litigate matters which had already been adjudicated in the 1997 Suit. The High Court allowed the application and struck out the 2013 Suit. The COA reversed that decision and reinstated the suit. The Federal Court refused to grant the respondents leave to appeal. The 2013 Suit then proceeded to trial and ended with the trial judge dismissing both the appellants' claim as well as the respondents' defences of limitation and res judicata. The instant appeal was against the dismissal of the appellants' claim. The respondents filed a cross-appeal against the dismissal of their pleas of limitation and res judicata. The trial court in the 2013 Suit held that: (a) it was bound by stare decisis (by virtue of the COA's decision to reinstate the suit, which decision was not disturbed by the FC) to reject the plea of res judicata; (b) limitation did not apply because time did not run when the parties were actively involved in the appeal process against the decision in the 1997 Suit; (c) the appellants could not complain of unjust enrichment when they had failed to make the requisite four purchase orders during the set off period; (d) there was no evidence that R1 had refused to sell the timber products and/or had quoted prices above the prevailing market price so as to frustrate the debt-settlement arrangement under the LOA; and (e) the fresh order for timber products placed by the appellants was a sham designed to obtain cash payment

of the balance of the debt long after the set off period had expired.

Held, unanimously dismissing the appellants' appeal and allowing the respondents' cross-appeal:

(1) The respondents' plea of limitation ought to have succeeded before the High Court because the 2013 Suit was filed about ten years after the claim had become time-barred. Given that the 1997 Suit was dismissed on the ground that the appellants' claim was premature and since the contra arrangement had failed, there was a debt which was still due and owing which could have been pursued in the form of a fresh suit. Taking 10 November 1997 (the date R1 replied to the appellants' solicitor admitting that it owed the appellants RM5,431,454.87) as the latest date for the purpose of computing time, the claim would have become time-barred by 9 November 2003. The 2013 Suit was filed on 10 May 2013, almost ten years after the claim became time-barred (see paras 182 & 184).

(2) The appellants could not rely on estoppel to bar the respondents from raising the defence of limitation as this was neither pleaded nor put to the respondents during the trial. In any event, nothing in the record showed that the respondents had acted in such a way as to induce or encourage the appellants in any particular way vis a vis the 1997 Suit or the 2013 Suit. The decision to file the 1997 Suit and to present the claim in the manner that the appellants did, and which resulted in the suit being dismissed, could not be attributed to the respondents (see para 162).

(3) There was no jurisdictional defect with regard to the 1997 Suit which triggered the application of s 14 of the SLO. There was no evidence to show that the 1997 Suit was prosecuted — either in the first instance or in the appeals — in courts which had no jurisdiction to adjudicate the claim. Hence, s 14 of the SLO did not apply to 'suspend' the period of limitation. The trial judge wrongly ruled that the limitation period was suspended. The fact that the 1997 Suit was dismissed on the ground that the appellants' claim was 'premature' also did not bring it within the ambit of s 14. The word 'premature' merely exemplified the fact that the appellants had not complied with the terms of the LOA so as to trigger R1's obligation to pay in cash. That had nothing to do with the court's jurisdiction but merely meant that the appellants had not made out their case to make a claim based on the LOA. The word 'premature' certainly did not mean that the contra/set off mechanism for payment could be resurrected by the issuance of a fresh order and entitle the appellants to mount a fresh suit against the respondents (see paras 144, 150, 168–169 & 172–174).

(4) The trial judge erred in declining to consider the respondents' plea of res judicata. The respondents were not precluded from re-ventilating that

issue at trial even though their earlier attempt to strike out the suit, inter alia, on that ground had failed. The dismissal of a striking-out application did not mean the issue which was the subject-matter of the application had been determined with 'finality'. The trial judge in the 1997 Suit had considered all issues in dispute in that suit before dismissing the appellants' claim as being 'premature'. The causes of action and subject-matters in both the 1997 Suit and the 2013 Suit were exactly the same (although the 2013 Suit was also based on the fresh order and claimed for additional accruing interest on the debt). The issues raised and the facts and evidence adduced by the appellants in both the suits were also substantially the same. No doubt, 'new issues' were raised by the appellants in the 2013 Suit but they were issues that could have been, but were not, raised in the 1997 Suit. The so-called 'new issues' were therefore caught by the doctrine of res judicata in its wider sense. The filing of the 2013 Suit was a clear manifestation of litigation by instalment and was an abuse of process (see paras 186, 192 & 199–207).

(5) The claim presented in the 2013 Suit was for payment of the balance of the outstanding sum and did not satisfy the elements for a cause of action for unjust enrichment, which, in any event, was barred by the limitation period of six years (see para 181).

(6) The trial judge rightly rejected the appellants' contention that the obligation was first on the respondents to make the offer to sell the timber products before the appellants were obliged to place orders for them. Clauses 2 and 5 of the LOA when looked at in totality conveyed quite clearly and in a common-sense way, that the onus was on the appellants, as the consumer or end-user, to make enquiries (which they did) and thereafter to place orders for the timber products. R1 did not have the primary obligation to make the initial offer to the appellants as it would not have been able to make any offer unless it first knew what timber products were required by the appellants (see paras 106 & 108–111).

[Bahasa Malaysia summary

Responden pertama ('R1'), mengendalikan satu kilang papan balaik, berhutang dengan perayu RM10,134,000 setakat akhir bulan Ogos 1996 dengan faedah yang berterusan sejak dari itu pada kadar 11% setahun setiap bulan yang dikira dari hari ke hari (hutang tersebut) dalam satu surat pengakuan ('SP') kepada perayu, R1 memberi akujanji untuk membayar hutang tersebut dengan menjual produk kayunya kepada perayu pada harga yang konsisten dengan harga pasaran pada waktu tersebut dalam empat hantaran dalam tempoh sepuluh bulan daripada 12 November 1996 sehingga 11 September 1997 (tempoh tolak selesai tersebut). Hasil jualan empat hantaran tersebut akan 'di tolak dari dan tolak selesai' terhadap hutang tersebut. SP tersebut turut menyatakan bahawa sekiranya perayu membatalkan atau menolak apa-apa pesanan atas alasan bahawa R1 gagal/enggan untuk

membekalkan apa-apa pesanan pembelian atau gagal untuk menggantikan apa-apa produk yang cacat yang telah di bekalkan, maka R1 perlu 'membayar secara tunai menggantikan produk kayu tersebut' dan pembayaran tunai sedemikian akan ditolak selesai terhadap hutang tersebut. Responden kedua ('R2') menjamin pembayaran semula R1 hutang tersebut dengan cara yang dibutirkan dalam SP. Selepas memesan dan menerima satu penghantaran produk kayu dari R1 pada awal September 1997, perayu telah menyaman responden ('guaman 1997') untuk pembayaran baki hutang dalam jumlah RM6,233,241 (dalam surat bertarikh 10 November 1997 kepada peguam perayu, R1 menyatakan bahawa baki hutang hanya RM5,431,454.87) R1 mencabar guaman 1997, atas alasan, antaranya, bahawa hutang tersebut telah diselesaikan atas sebab kegagalan perayu untuk membuat empat pesanan pembelian dalam tempoh tolak selesai tersebut. Untuk sebab yang sama, hakim bicara memutuskan bahawa tuntutan perayu adalah pramatang dan menolak guaman 1997 tersebut, Mahkamah Rayuan ('MR') telah mengenepikan keputusan tersebut dan memberikan penghakiman memihak kepada perayu. MR mengambil maklum bahawa daripada empat cubaan yang dibuat oleh perayu untuk membeli produk kayu R1, hanya satu transaksi telah diselesaikan kerana pihak-pihak tidak dapat bersetuju berkaitan dengan harga (perayu mengatakan bahawa R1 memberi sebut harga yang terlalu tinggi dan tidak konsisten dengan harga pasaran pada waktu tersebut) dan sejak pihak-pihak tidak dapat bersetuju atas satu terma assas, makan tiada peruntukan dalam SP untuk menyelesaikan isu tersebut, SP tersebut telah dikecewakan. Pada 7 September 2009, Mahkamah Persekutuan ('MP') telah mengenepikan keputusan MR dan mengekalkan keputusan Mahkamah Tinggi dan memutuskan bahawa MR tidak sepatutnya mengambilkira isu kekecewaan kerana ianya tidak diplidkan. Tiga tahun selepas keputusan MP (dan 15 tahun selepas tempoh tolak selesai tersebut telah luput), perayu membuat satu pesanan baru dan menuntut pembayaran tunai segera jumlah RM6,223,241 dari responden. Apabila tuntutan tersebut juga tidak diendahkan, perayu, pada 10 May 2013, telah menyaman responden (guaman 2013) untuk pembayaran RM6,233,241 dan dengan faedah terakru berjumlah kepada RM10,635,945.65. dalam guaman tersebut. Dalam guaman tersebut, perayu menyatakan bahawa R1 telah dengan sengaja mengecewakan pelaksanaan persetujuan pelangsaian hutang tersebtu dalam SP dengan sama ada enggan untuk menjual produknya kepada perayu dengan menyebut harga yang lebih tinggi daripada harga pasaran. Perayu juga menyatakan bahawa dengan enggan untuk menyelesaikan baki hutang, responden telah secara salah mengayakan diri mereka sendiri. Responden memohon untuk membatalkan guaman 2013 atas alasan had masa dan res judicata — sebagai contoh, pembelian terkini pesanan pembelian merupakan satu penipuan untuk membangkitkan semula satu hutang yang telah dihalang oleh had masa dibawah Ordinan Had Masa Sabah ('Ordinan') dan guaman 2013 cuba untuk melitigasikan semula perkara yang telah dihakiman dalam guaman 1997, mahkamah tinggi membenarkan permohonan tersebut dan membatalkan guaman 2013. MR mengetepikan

keputusan tersebut dan membenarkan semula guaman tersebut. Mahkamah Persekutuan enggan untuk membenarkan izin untuk perayu merayu. Guaman 2013 kemudiannya telah dibicarakan dan berakhir dengan hakim bicara mengetepikan tuntutan perayu dan pembelaan had masa dan res judicata responden. Rayuan ini berkaitan dengan penolakkan tuntutan perayu. Responden memfailkan rauuan balas terhadap penolakan dan pli had masa dan res judicata mereka. Mahkamah bicara dalam guaman 2013 memutuskan bahawa: (a) ianya terikat dengan stare decisis (atas sebab keputusan Mahkamah Rayuan untuk mengembalikan guaman tersebut, yang mana keptuusan tersebut tidak diganggu oleh MP) untuk menolak pli res judicata; (b) had masa tidak terpakai kerana masa tidak bermula apabila pihak-pihak tidak secara aktif terlibat dengan proses rayuan terhadap guaman 1997; (c) perayu tidak boleh membangkitkan pengkayaan tidak adil apabila mereka gagal untuk membuat empat pesanan pembelian yang diperlukan dalam tempoh tolak selesai tersebut; (d) tiada keterangan bahawa R1 enggan untuk menjual produk kayu tersebut dan/atau telah menyebut harga melampaui harga pasaran untuk mengecewakan aturan penyelesaian hutang dibawah SP; dan (e) pesanan baru untuk produk kayu yang dibuat oleh perayu merupakan satu penipuan yang dibuat untuk mendapatkan pembayaran tunai baki hutang lama selepas tempoh tolak selesai telah luput.

Diputuskan, sebulat suara menolak rayuan perayu dan membenarkan rayuan silang responden:

(1) Pli responden menganai had masa sepatutnya berjaya dihadapan Mahkamah Tinggi kerana guaman 2013 difailkan lebih kurang sepuluh tahun selepas tuntutan tersebut di halang oleh had masa. Mengambil kira bahawa guaman 1997 telah ditolak atas alasan bahawa tuntutan perayu adalah pra-matang dan sejak perjanjian kontra telah gagal, wujud hutang yang masih perlu dibayar dan terhutang yang boleh di dapati dalam bentuk satu guaman baru. Mengambil 10 November 1997 (tarikh R1 membalas kepada peguam perayu mengakui bahawa dia berhutang kepada perayu RM5,431,454.87) sebagai tarikh terkini untuk tujuan mengira masa, tuntutan akan dihalang oleh had masa pada 9 November 2003. Guaman 2013 difailkan pada 10 Mei 2013, hampir sepuluh tahun selepas tuntutan tersebut dihalang oleh had masa (lihat perenggan 182 & 184)

(2) Perayu tidak boleh bergantung pada estopel untuk menghalang responden dari membangkitkan pembelaan had amasa kerana perkara ini tidak diplidkan atau dicadangkan kepada responden sewaktu perbicaraan. Dalam apa keadaan, tiada apa-apa dalam rekod menunjukkan bahawa responden telah bertindak dalam cara untuk menyebabkan atau menggalakan perayu dalam apa cara sekalipun yakni guaman 1997 atau guaman 2013. Keputusan untuk memfailkan guaman 1997 dan untuk mengemukakan tuntutan dalam cara yang dilakukan

oleh perayu dan yang meneybabkan guaman tersebut dibatalkan, tidak boleh katakan berpunca dari responden (lihat perenggan 162).

(3) Tiada kecacatan bidang kuasa berkaitan dengan guaman 1997 yang menyebabkan pemakaian s 14 Ordinan. Tiada keterangan untuk menunjukkan bahawa guaman 1997 didakwa — sama ada pada peringkat pertama atau dalam rayuan — di mahakamah yang tidak mempunyai bidang kuasa untuk mengadili tuntutan tersebut. Oleh yang demikian, s 14 Ordinan tidak terpakai untuk menggantung tempoh had masa. Hakim bicara telah secara salah memutuskan bahawa tempoh had masa digantung. Fakta bahawa guaman 1997 dibatalkan atas alasan bahawa tuntutan perayu adalah pra-matang juga tidak membawanya dibawah pemakaian s 14. Perkataan pram-matang hanya menunjukkan fakta bahawa perayu tidak mematuhi terma SP untuk menyebabkan R1 mempunyai tanggungjawab untuk membayar secara tunai. Ianya tidak mempunyai apa-apa kaitan dengan bidang kuasa mahkamah akan tetapi hanya bermaksud bahawa perayu tidak membuktikan kes mereka untuk membuat satu tuntutan berdasarkan SP. Perkataan pramatang tidak bermaksud bahawa kontra/mekanisma tolak selesai untuk pembayaran boleh dihidupkan semula dengan pengeluaran satu perintah baru dan memberikan perayu hak untuk memulakan guaman baru terhadap responden (lihat perenggan 144, 150, 168–169 & 172–174).

(4) Hakim bicara terkhilaf apabila enggan untuk menimbangkan pli res judicata ressponden. Responden tidak dihalang daripada mengemukakan semula isu tersebut sewaktu perbicaraan walaupun cubaan awal mereka untuk membatalkan guaman tersebut, antara lain, pada peringkat itu telah gagal. Penolakan permohonan untuk membatalkan tidak bermaksud bahawa isu yang merupakan hal-perkara permohonan telah ditentukan secara muktamad. Hakim bicara dalam guaman 1997 telah menimbangkan semua isu yang dipertikaikan dalam guaman sebelum menolak tuntutan perayu sebagai pra-matang. Kausa tindakan dan hal pekara dalam guaman 1997 dan 2013 adalah sama (walaupun guaman 2013 juga adalah berdasarkan perintah baru dan menuntut untuk faedah tambahan atas hutang tersebut). Isu yang dibangkitkan dan fakta dan keterangan yang dikemukakan oleh perayu dalam kedua-dua guaman adalah sama secara substantif. Tiada keraguan bahawa isu baru dibangkitkan dalam gumaan 1997/isu yang dikatakan baru tersebut oleh yang demikian terjatuh dibawah doktrin res judicata. Pemfailan guaman 2013 merupakan satu cubaan jelas untuk membuat litigasi secara berperingkat dan merupakan satu penyalahgunaan proses (lihat perenggan 186, 192 & 199–207).

(5) Tuntutan yang dikemuakan dalam guaman 2013 adalah untuk pembayaran baki jumlah terhutang dan tidak memenuhi keperluan untuk satu kausa tindakan untuk mengkayakan diri sendiri secara tidak

adil, yang mana, dalam apa keadaan sekalipun, dihalang oleh tempoh had masa enam tahun (lihat perenggan 181).

(6) Hakim bicara telah dengan betul menolak pengataan perayu bahawa tanggungjawab adalah pada pihak responden untuk membuat tawaran untuk menjual produk kayu sebelum perayu mempunyai tanggungjawab untuk meletakkan pesanan untuknya. Klausa 2 dan 5 SP apabila dilihat secara keseluruhan menyatakan secara jelas bahawa beban adalah pada perayu, sebagai pengguna atau konsumer, untuk membuat pertanyaan (yang mana dilakukan oleh mereka) dan selepas dari itu, membuat pesanan untuk produk kayu. R1 tidak mempunyai tanggungjawab utama untuk membuat tawaran awal kepada perayu kerana mereka tidak boleh membuat apa-apa tawaran kecuali mereka mengetahui produk kayu apa yang diperlukan oleh perayu (lihat perenggan 106 & 108–111).]

Cases referred to

Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 202; [1989] 1 CLJ Rep 219; [1989] 1 CLJ 693, HC (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783; [1995] 1 MLRA 611; [1995] 3 AMR 2559, SC (refd)

Capital One Ltd v EC Corporate Management Inc & Ors [2013] 1 LNS 817; [2013] 6 AMR 639, HC (refd)

Cartledge (Widow and Administratrix of The Estate of Fred Hector Cartledge (deceased)) and Others v E Jopling & Sons, Ltd [1963] 1 All ER 341, HL (refd)

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1988] 3 MLJ 90; [1988] 1 CLJ Rep 435; [1988] 2 CLJ 35, HC (refd)

Code Brilliant Sdn Bhd (in liquidation) & Ors v Heng Ji Keng & Ors [2013] 9 MLJ 212; [2012] 1 LNS 873, HC (refd)

Dato' Ahmad Johari Tun Abdul Razak v A Santamil Selvi Alau Malay & Ors And Other Appeals [2020] MLJU 562; [2020] 7 CLJ 588; [2020] AMEJ 0409, CA (refd)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441; [2015] 2 AMR 601; [2015] AMEJ 319; [2015] 2 CLJ 453, FC (refd)

Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57; [1997] 2 CLJ 104; [1996] 2 AMR 1457, CA (consd)

Lin Wen-Chih & Anor v Pacific Forest Industries Sdn Bhd & Anor [2008] 6 MLJ 89; [2008] 5 CLJ 29; [2009] 3 AMR 205, CA (refd)

Lin Wen-Chih & Anor v Pacific Forest Industries Sdn Bhd & Anor [2000] MLJU 533; [2001] 5 CLJ 519; [2001] 1 AMR 988, HC (refd)

Lin Wen-Chih & Anor v Pacific Forest Industries Sdn Bhd & Anor [2019] 9 MLJ 227; [2018] 1 LNS 2022; [2018] AMEJ 1768, HC (refd)

Mohd Sari bin Datuk Okk Hj Nuar & Ors v Asia General Equipment and Supplies Sdn Bhd & Ors [2010] 5 MLJ 766; [2010] MLJU 287, CA (refd)

A *Ong Ah Bee v Hii Chung Siong, Robin* [1993] 1 CLJ 504; [1992] 3 MLRH 428, HC (refd)
Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor [2009] 6 MLJ 293; [2009] 6 CLJ 430; [2009] 1 LNS 825, FC (refd)
Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur &
B *Anor* [2016] 3 MLJ 1; [2016] MLJU 12; [2016] 3 CLJ 1; [2016] 1 LNS 39; [2016] 2 MLRA 263, FC (refd)
Superintendent of Pudu Prison & Ors v Sim Kie Chon [1986] 1 MLJ 494; [1986] 1 CLJ 548; [1986] 1 MLRA 131, SC (refd)
Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul
C *Naim* [2015] 3 MLJ 609; [2015] 2 CLJ 1037; [2015] 2 AMR 124, FC (refd)
The Pacific Bank Bhd v Chan Peng Leong [1998] 2 MLJ 613; [1998] 2 CLJ 440; [1998] 1 MLRA 81; [1998] 2 AMR 1895, CA (refd)

D **Legislation referred to**

Limitation Ordinance (Cap 72) ss 3, 14, Schedule, items 95, 97
Rules of Court 2012 O 18 r 19
Rules of the Federal Court 1995 r 137

E **Appeal from**: Civil Suit No TWU-22–18/5 of 2013 (High Court, Tawau).

Cheng Ho Wah @ Roland (Michelle Yee Fui Shin and Henry Lim Ken Fui with him) (Roland Cheng & Co) for the appellants.
Alex Decena (Leslie Chaw Cheng Yung with him) (Poh & Victor Chong) for the
F *respondents.*

Nantha Balan JCA (delivering judgment of the court):

INTRODUCTION

G

[1] This is an appeal by the plaintiffs against the decision of the learned judge of the High Court ('the judge') dated 11 June 2018 dismissing their claim (after a full trial) in Civil Suit No TWU–22–18/5 of 2013 ('the 2013 Suit'). The 2013 Suit was filed on 10 May 2013 and has been deliberately described as such
H so as to distinguish it from an earlier suit, which was registered as High Court at Tawau Civil Suit No T-22-12 of 1997 ('the 1997 Suit') involving the same parties and which dealt with the same subject matter. The judge's decision in the 2013 Suit is reported as *Lin Wen-Chih & Anor v Pacific Forest Industries Sdn Bhd & Anor* [2019] 9 MLJ 227; [2018] 1 LNS 2022; [2018] AMEJ 1768
I (HC).

[2] For convenience and brevity, we shall refer to the parties according to their respective capacities in the High Court. Hence, the first and second appellants shall be referred to individually as 'first plaintiff' and 'second

plaintiff' respectively, and collectively as 'the plaintiffs'. The first and second respondents shall be referred to individually as first defendant' and 'second defendant' respectively, and collectively as 'the defendants'.

[3] The plaintiffs' claim in the 2013 Suit was for the sum of RM16,859,186.65 (RM6,223,241 + RM10,635,945.65) (as at 10 May 2013) against the first defendant based on the first defendant's letter of acknowledgement dated 12 November 1996 and against the second defendant, as guarantor based on the second defendant's letter of undertaking dated 12 November 1996.

[4] In their defence, the defendants raised, inter alia, the issue of limitation and res judicata. According to the defendants, the judge ought to have ruled that the 2013 Suit was barred by limitation and res judicata. However, the judge ruled against the defendants on both these issues. The judge found against the plaintiffs on almost all the other issues. Hence, the end result was that the plaintiffs' claim (per the 2013 Suit) was dismissed. But the defendants nevertheless proceeded to lodge a notice of cross-appeal dated 3 September 2018 ('the cross-appeal') on the issue of limitation and res judicata.

[5] The defendants' plea of res judicata was predicated on the fact that the plaintiffs had previously filed the 1997 Suit and that the issues raised in the 2013 Suit were either raised or subsumed in the 1997 Suit or at any rate, were issues which could have been, but were not raised in the earlier action. As for limitation it was contended that even if the plaintiffs are entitled to sue for the balance of the outstanding sum either on the basis of breach of a written contract or unjust enrichment, these cause(s) of action are time-barred as the limitation period for the cause of action based on a breach of a contract in writing or for unjust enrichment is six years.

[6] Thus, it was argued that on the facts here, the plaintiffs' action was time-barred either by October 2003 or latest, by 9 November 2003. The significance of these dates are elaborated in the later part of this judgment.

[7] We heard the plaintiffs' appeal (and defendants' cross-appeal) on 23 October 2020. We agreed with some of the judge's findings. However, we disagreed with the judge's findings on the issue of limitation and res judicata. In the result, the defendants' cross-appeal was allowed, and the plaintiffs' appeal was dismissed. These are the reasons for our decision.

THE BACKGROUND

[8] The first defendant is a private limited company incorporated in Malaysia and operated a sawmill. The first defendant was formerly known as

Veramex Sdn Bhd. The plaintiffs are brothers of Taiwanese nationality. The plaintiffs and their two other brothers were previously the shareholders of the first defendant. The plaintiffs were also directors of the first defendant. The second defendant was a shareholder of the first defendant. The plaintiffs ceased to be directors of the first defendant on 12 February 1997.

[9] By a share sale agreement dated 12 November 1996 ('the SSA'), the plaintiffs sold and transferred their shares in the first defendant to Liu Ho Thien who is said to be the representative and nominee of the second defendant.

[10] At all material times, the first defendant was indebted to the plaintiffs. The sum which was due and owing by the first defendant to the plaintiffs as at 28 August 1996 was RM10,134,000 ('the outstanding sum'). The first defendant is not a party to the SSA. However, the parties to the SSA agreed per cl 8.0 thereof, that the outstanding sum is due and owing by the first defendant to the plaintiffs.

[11] Clause 8.0 of the SSA reads as follows:

> 8.0 *REPAYMENT OF OUTSTANDING SUM*
>
> 8.1 The Vendors and the Purchaser hereby acknowledge that a sum of RINGGIT MALAYSIA TEN MILLION ONE HUNDRED AND THIRTY FOUR THOUSAND (RM10,134,000.00) only (hereinafter called 'the outstanding sum') is presently owing by the Company to the following persons (hereinafter jointly called 'the Lin Brothers') in the amount appearing next to their respective names and that the Company shall pay interest on the outstanding sum or the balance thereof outstanding from time to time on monthly rests at the rate of ELEVEN per centum (11%)pa calculated day to day from the date of this Agreement to the date of full payment thereof (hereinafter called 'the Agreed Interest'):-
>
> 8.1.1 LIN WEN-CHUAN — RINGGIT MALAYSIA
>
> FIVE MILLION ONE HUNDRED AND THIRTY FOUR THOUSAND (RM5,134,000.00) only
>
> and
>
> 8.1.2 LIN WEN-CHIH - RINGGIT MALAYSIA FIVE MILLION (RM5,000,000.00) only.

[12] The outstanding sum was also stated in a letter of confirmation dated 28 August 1996 which was signed by the plaintiffs and confirmed by the second defendant. The letter of confirmation reads as follows:

> We, the undersigned hereby confirm that the Total Net Balance due to Lin Wen Chuan and Lin Wen Chih ('The Lins') from Veramax Sdn. Bhd. as of current date is RM10,134,000 to be accounted for in the books as follows:

1. Due to Mr Lin Wen Chuan — RM5,134,000

2. Due to Mr Lin Wen Chih — RM5,000,000

There are no other claims whatsoever from The Lins and their related companies against Veramax Sdn. Bhd. other than the sum stated above.

Dated this 28th day of August 1996

...

Lin Wen Chuan

Lin Wen Chih

Confirmed by: MYCOM BERHAD

[13] The next document is *critical*. Indeed, the 2013 Suit (and previously, the 1997 Suit) were predicated on, inter alia, the first defendant's letter of acknowledgement dated 12 November 1996 ('letter of acknowledgement'), whereby the first defendant acknowledged and admitted to owing the plaintiffs the outstanding sum and interest thereon at 11%pa and undertook to pay the debt by way of supply of timber products within a period of ten months from the date of the letter of acknowledgement ie by 11 September 1997.

[14] The letter of acknowledgement which was signed by Bobby Yeap (Managing Director of the first defendant) reads as follows:

12 November 1996

Our Ref: FIN/96/L/0080

To:

Lin Wen-Chuan & Lin Wen-Chih

both of KM9, Jalan Apas

Tawau, Sabah

Dear Sirs,

Re: Outstanding sum of RM10,134,000 and Provision for taxation of RM3,295,453.00

We refer to the above and hereby *acknowledge that a sum of RM10,134,000 ('the Outstanding Sum') as agreed on 28/8/96 is presently owing by us to you* in the following proportion:

1) Lin Wen-Chuan — RM5,134,000 and

2) Lin Wen-Chih — RM5,000,000.00

We hereby confirm and undertake with you as follows:

1. we shall pay you interest on the Outstanding Sum or the balance thereof outstanding from time to time on monthly rests at the rate of eleven per centum (11%)pa calculated day to day from today to the date of full payment thereof ('the Agreed Interest');

2. *we shall sell and you shall purchase timber products manufactured by us ('the Timber Products') at a price consistent with the prevailing market price and costing the same amount as the Outstanding Sum plus the Agreed Interest ('the Timber Products Price') from us over a period of ten (10) months from today and to be delivered over four (4) shipments*;

3. the Timber Products Price shall be deducted from and set off against the Outstanding Sum and the Agreed Interest.

4. subject to item 5 hereinafter contained, the Outstanding Sum and the Agreed Interest shall be repaid by us to you only by way of deduction from and set off against the Timber Products Price.

5. *in the event that we shall fail, refuse and/or neglect to supply any of the Timber Products ordered by you or if any of the Timber Products supplied by us shall not be in accordance with the specifications stated in your purchase order(s), you shall be entitled, after giving us thirty (30) days' notice in writing to supply the Timber Products or replace the defective Timber Products and we have failed to do so, to cancel the order for such Timber Products or reject such Timber Products. Upon the order for such Timber Products being cancelled or such Timber Products being rejected and returned to us, we shall then pay cash in lieu of such Timber Products to you* and such cash payment shall be deducted from and set off against the Outstanding Sum and the Agreed Interest; and

6. in the event that the final amount of income tax payable by us as assessed and raised by the Director General of Inland Revenue for the period up to and including the 30th day of September, 1995 shall be less than the provision for taxation in our accounts ie RINGGIT MALAYSIA THREE MILLION TWO HUNDRED AND NINETY- FIVE THOUSAND FOUR HUNDRED AND FIFTY THREE (RM3,295,453.00) only, we shall pay the difference thereof to you within FOURTEEN (14) days of receipt of the final notice of assessment from the Director General of Inland Revenue for the appropriate tax relief/rebate within THIRTY (30) days after completion of the Share Sale Agreement dated 12/11/96 between yourselves, Lin Wen-Fu and Lin Wen-Cheng jointly and severally of the one part and Liu Ho-Tien of the other part and keep you informed of such application from time to time. (Emphasis added.)

[15] The next significant document is the second defendant's letter of undertaking dated 12 November 1996 ('the letter of undertaking') whereby they guaranteed the payment of the outstanding sum that was to be made by the first defendant together with the agreed interest.

[16] The letter of undertaking reads as follows:

12 November 1996

Lin Wen Chuan & Lin Wen Chih

both of KM 9 Jalan Apas

Tawau, Sabah

Dear Sirs

Re: Outstanding sum of RM10,134,000 payable to you by Pacific Forest Industries Sdn Bhd (formerly known as Veramax Sdn Bhd) ('The Company')

In consideration of you selling your 7,500,000 ordinary shares fully paid up in the Company to Liu Ho-Tien ('Purchaser') and for this purpose to enter into a Share Sale Agreement with the Purchaser upon such terms and conditions as are therein contained, *we hereby guarantee the payment of the Timber Products Price and The Agreed Interest* by the Company to you within the time stipulated in the letter of even date from the Company to you ('the Company's Letter').

In the event that the Company shall fail to pay you the Timber Products Price and/or The Agreed Interest in full by the time stipulated in the Company's Letter, we shall pay you the same or any balance thereof then outstanding within fourteen (14) days from our receipt of written notice from you to do so.

Words and expression used herein shall have the same meaning and intent as in the Company's Letter.

Yours faithfully

MYCOM BERHAD

DATO' YAP YONG SEONG

Group Managing Director

[17] Thus, based on the confirmation letter dated 28 August 1996, cl 8.0 of the SSA, the letter of acknowledgement and the letter of undertaking, it is clear and indisputable that there was a debt in the sum of RM10,134,000 which was due and owing by the first defendant to the plaintiffs and the payment of which had been guaranteed by the second defendant. From a plain reading of the letter of acknowledgement, there was an admission that the outstanding sum was due and owing by the first defendant to the plaintiffs. There was also an agreed set off/contra arrangement between the plaintiffs and the first defendant (per the letter of acknowledgement) whereby the outstanding sum was to be paid or settled, in-kind (vis timber-products).

[18] Thus, pursuant to the arrangement, the cost of the timber products sold was to be deducted from and set off against the outstanding sum and interest which had been agreed upon. Hence, what the parties agreed to was that the debt (outstanding sum) was to be set off via a contra against the supply of the first defendant's timber products to the plaintiffs. The price of timber to be

supplied was to be at 'a price consistent with the prevailing market price'.

[19] If, however, the timber products were not supplied according to the terms as stated in the letter of acknowledgement, then the first defendant undertook to pay cash in lieu of the timber products. The contra/set off arrangement was to be done via four shipments of timber products and this was to be completed within a period of ten months from the date of the letter of acknowledgement ie between 12 November 1996 to 11 September 1997 ('the set off period').

[20] It is common ground that during the set off period, there was a reduction of the outstanding sum when the plaintiffs placed an order for a shipment of wooden laminated board, and which was duly delivered by the first defendant. This was done pursuant to a sale transaction dated 6 September 1997. There was consequently a balance of the outstanding sum which in itself is in dispute between the parties.

[21] The plaintiffs put the balance of the outstanding sum as at 27 October 1997 to be RM6,223,241 whilst the first defendant gives the figure of RM5,431,454.87 as at 15 September 1997. The dispute in this regard can be gleaned from the following correspondence.

[22] The first letter is the letter of demand dated 15 September 1997 issued by Messrs Shim, Pang & Co (on behalf of the plaintiffs) to the first defendant. The letter reads as follows:

> 15th September 1997
>
> Pacific Forest Industries Sdn Bhd
>
> (formerly known as Veramax Sdn Bhd)
>
> P.O. Box 60720
>
> 91017 Tawau,Sabah
>
> Re: Letter of Undertaking dated 12th November 1996
>
> Outstanding sum of RM10,134,000.00
>
> We act for Lim Wen Chih and Lim Wen Chuan and refer to the above matter.
>
> We are instructed by our client that pursuant to the abovementioned letter of undertaking, the outstanding sum (as at 15th September 1997) owe by you to our client is RM6,144,489.00.
>
> Take Notice that unless you pay the said sum of RM6,144,489 to us within thirty (30) days from the date hereof, legal proceedings shall be commence against you with costs and interest without further reference to you.
>
> We trust such an extreme action will not be necessary.

Yours faithfully,

[23] Next is the letter by Messrs Shim, Pang & Co dated 27 October 1997 to the second defendant which reads as follows:

27th October 1997

Mycom Bhd (Co. No. 7296V)

Level 23, Plaza Raja Chulan

8, Jalan Raja Chulan

50200 Kuala Lumpur

Dear Sirs

RE:Your Outstanding Account With

Mr Lin Wen-Chin & Mr Lin Wen-Chuan

Letter of Guarantee for Pacific Forest Industries Sdn Bhd

We act for Mr Lin Wen-Chin and Mr Lin Wen-Chuan of Taiwan.

We are instructed to demand from you the sum of *RM6,223,241 as at 27th October 1997* as *guarantor* to Pacific Forest Industries Sdn Bhd (formerly known as Veramax Sdn Bhd) being outstanding balance owing by the said Pacific Forest Industries Sdn Bhd and you as guarantor to our clients.

Take Notice that unless the said sum of *RM6,223,241.00* is paid direct into our office as solicitors for our clients *within fourteen*

(14) days from the receipt of this letter by you, proceedings may be commenced against you with costs and interest without further reference to you.

We trust such an extreme action will not be necessary.

[24] By a letter dated 10 November 1997, the first defendant replied to Messrs Shim,Pang & Co and stated the following:

10 November 1997 Our Ref: FIN/97/L/0172

SHIM, PANG & CO

2nd Floor, TB 265,

Block 27 Fajar Complex,

Jalan Mahkamah

P.O.Box 60193,

91011 Tawau Sabah

Dear Sir,

Re: Outstanding Account with Mr Lin Wen-Chih & Mr Lin Wen- Chuan

A We refer to your letter of 27/10/1997.

Attached herewith is a copy of our statement of account which showed *the sum due to the abovenamed is RM5,431,454.87*.

We shall be grateful if you could enlighten us as to how the sum of RM6,223,241
B is arrived at.

Thank you.

Yours faithfully,

for Pacific Forest Industries Sdn Bhd

C PACIFIC FOREST INDUSTRIES SDN BHD

... cc: HQ - KL

D **[25]** Thus, as at 10 November 1997, the first defendant had clearly and unequivocally admitted that they owed RM5,431,454.87 to the plaintiffs. This event took place well after the expiry of the set off period. No doubt, the statement of account which was attached to the first defendant's letter demonstrated with arithmetical or book-keeping accuracy, the various
E deductions which were made and how they arrived at RM5,431,454.87.

[26] The question is, were these deductions lawfully made or were they unilateral deductions? From the evidence adduced in the trial of the 1997 Suit, it is quite obvious that these deductions were made unilaterally by the first
F defendant without the consent or agreement of the plaintiffs.

[27] As for the admission that RM5,431,454.87 was owed to the plaintiffs, the first defendant offered the purported explanation in the 1997 Suit that it was only for 'write-off' purposes as they took the position that since the
G plaintiffs did not comply with terms of the letter of acknowledgement within the set off period, their liability towards the plaintiffs vis a vis the balance of the outstanding sum had extinguished.

THE 1997 SUIT

H

[28] The 1997 Suit was filed on 24 November 1997. In the 1997 Suit, the plaintiffs claimed against the first defendant and second defendant for the principal sum of RM6,223,241.10 with the interest of 11%pa based on the letter of acknowledgement and the letter of undertaking, respectively.

I

[29] The plaintiffs took the position that they had, on no less than four occasions placed purchase orders for the timber products. But they said that they could not conclude any sales as they could not agree on the price. The evidence that was adduced at the trial suggested that the plaintiffs had only

placed one order, which was fulfilled. However, there were many enquiries by the plaintiffs. A

[30] The first defendant disputed liability for the balance of the outstanding sum and maintained that: (a) the plaintiffs were obliged to order and purchase the timber products within the set off period; (b) there was no negotiation for repayment of the debt after expiry of the set off period; (c) that the debt was discharged by omission of the plaintiffs to make purchase orders for the timber products within the set off period; and (d) the first defendant's liability to pay cash only arises if any order for the timber products were cancelled or rejected (per cl 5 of the letter of acknowledgement). B C

[31] On 29 July 2000, the plaintiffs' claim in the 1997 Suit was dismissed. The trial judge was Justice Richard Malanjum (*as he then was*) ('the trial judge'). He found that the plaintiffs' action was 'premature' as they had only concluded one order for the timber products with the first defendant out of 'four orders' as contemplated under the letter of acknowledgement. The decision of the High Court in the 1997 Suit is reported as *Lin Wen-Chih & Anor v Pacific Forest Industries Sdn Bhd & Anor* [2000] MLJU 533; [2001] 5 CLJ 519; [2001] 1 AMR 988 (HC). D E

[32] The High Court found that the whole of the plaintiffs' claim was premature as the terms in the letter of acknowledgement for the first defendant to pay cash were not satisfied. The second defendant was found not liable for the guarantee in the letter of undertaking. The letter of acknowledgement is referred to in the judgment as 'exh P2'. F

[33] The relevant parts of the judgment of the High Court in the 1997 Suit are reproduced (at pp 530–532 CLJ) below: G

> Hence, at the outset it is necessary to consider whether there was an admission arising from the documents executed by the parties. In this case there are the exh P1, exh P2 and exh P6 (A and B) to consider.
>
> Now, there is no denial that exh P1 itself demonstrates that indeed there is an admission of the outstanding sum being due and confirmed by the second defendant. However, there is exh P2 to note. Although it was also an admission by the first defendant of the outstanding sum, there were certain terms imposed. As to the effectiveness of those terms it is a matter of interpretation of the document by this court. H
>
> In the case of *Malayan Banking Bhd v PK Rajamani* [1994] 2 CLJ 25 it was held that the law will always look beyond the terminology of the document to the actual facts of the situation and it is no longer a question of words but substance. I
>
> Having heard the evidence including the events leading to its issuance and having considered the contents in so far as exh P2 is concerned I do not think there is any

dispute as to the meanings and implications of the words used therein. There is also no doubt that it was issued by the first defendant. And the plaintiffs accepted it and in fact went on to attempt to observe the terms therein. That can even be seen from the submissions of their learned counsel who asserted that orders were placed pursuant to the said document by way of various enquiries. Unfortunately, such a stand is not consonant with the evidence of the plaintiffs who both testified that there was only one order placed while many enquiries were made. Hence, the true position is that the plaintiffs proceeded to observe the terms of exh P2 and the result is that there was only one order made out of the four orders contemplated.

In fact the first plaintiff (PW1) said that there was no other order made since the price could not be agreed upon. I am therefore quite surprised when learned counsel for the plaintiffs remained adamant that orders were made and thus taking that position to argue that exh P2 could be enforced as an admission.

I would have thought it might have been more beneficial to consider whether the debt is still due regardless of the non-compliance of the terms in exh P2.

Accordingly, I find that the parties considered themselves bound by the terms as stated in exh P2 and in fact acted upon them. And although PW1 said that they had no choice but to agree since they were eager for the payment, nevertheless, I am of the view that having taken that position it would have been a matter of observing the terms therein.

Nothing could have prevented them from placing their orders and waiting for the first defendant to meet them. As such I do not think it can be summarily dismissed the notion that exh P2 formed the basis of an agreement of the parties pertaining to the settlement of the outstanding sum. Indeed, I would say that exh P2 may be an admission on the part of the first defendant but it was subject to certain conditions which the plaintiffs subsequently accepted, if not in writing then through their conduct.

Hence, I am inclined to agree with the contention of the learned counsel for the first defendant that since the plaintiffs failed to comply with the terms stipulated in exh P2 within the time specified or within a reasonable time after the expiry and since it was not shown that the events that could have triggered the payment of cash had arisen the claim should therefore be taken as premature.

[34] The plaintiffs were dissatisfied with the decision of the High Court. On 21 August 2000, the plaintiffs filed an appeal against the High Court's order in the 1997 Suit. The plaintiffs' appeal was allowed on 28 May 2008. The Court of Appeal reversed the decision of the High Court. According to the Court of Appeal since the parties could not agree on the price of the timber products and as there was no provision in the letter of acknowledgement to settle such disagreement, the letter of acknowledgement (described as 'the agreement') was discharged by 'frustration'.

[35] Therefore, the Court of Appeal allowed the plaintiffs' appeal and set aside the High Court's order and entered judgment in favour of the plaintiffs.

The Court of Appeal's decision is reported as *Lin Wen-Chih & Anor v Pacific Forest Industries Sdn Bhd & Anor* [2008] 6 MLJ 89; [2008] 5 CLJ 29; [2009] 3 AMR 205 (CA). A

[36] In summary, the Court of Appeal's findings (p 95 (MLJ); 30 (CLJ)) were as follows: B

> It was not in dispute that the first respondent had acknowledged indebtedness of the sum of RM10,134,000 to the appellants which, however, was to be repaid by way of a set off according to the manner as spelled out in exh P2. Out of a total of four attempts to purchase the first respondent's timber products, only one transaction was concluded for the purpose of this set off due to the parties' failure to agree on the price. C
>
> According to the appellants, the prices quoted by the first respondent were too high and were inconsistent with those prevailing in the market at the material time. This was the price agreed upon by the parties under exh P2. D
>
> When the parties disagreed on this fundamental term and there was no provision in the agreement to settle this, then the agreement was frustrated. When the price could not be agreed upon, then naturally there could be no purchase of the first respondent's timber products for the purpose of set off. Under such circumstances, both ss 57(2) and 33 of the Contracts Act 1950 applied. E
>
> Further, the High Court's opinion that the appellants' claim was premature due to their failure to conclude the remaining transactions for the purpose of set off was erroneous in this respect: that any further attempts to transact between the parties would again fail on the issue of price. It was futile for the parties to continue with the contract since this matter would never be settled. (paras 12, 13 & 14) F
>
> When the agreement was discharged by frustration, s 15 of the Civil Law Act 1956 applied to the appellants' claim. It was thus concluded that what the appellants were claiming was within the provision of the law since they had debited the value of the timber products from the only transaction between the parties from the total debt. (paras 15 & 16). G

[37] The defendants obtained leave of the Federal Court and lodged an appeal to the Federal Court. On 7 September 2009, the Federal Court allowed the defendants' appeal and reinstated the High Court's decision. The Federal Court ruled that the Court of Appeal ought not to have considered the issue of frustration as it was not pleaded by the plaintiffs. H

[38] The decision of the Federal Court is reported as *Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor* [2009] 6 MLJ 293; [2009] 6 CLJ 430; [2009] 1 LNS 825 (FC). The opinion of the Federal Court (p 431 CLJ) may be summarised as follows: I

(1) In the instant appeal, the case was pleaded on a breach of contract. The first defendant's defence was that the respondents/plaintiffs had only

ordered one shipment, three shipments short of the terms of the agreement, although the first defendant was ready and willing to supply the timber products. The reply contended otherwise. There was nothing in the pleadings that could be related to frustration. It is trite that in pleading frustration, particulars which give rise to frustration must be provided specifically in the pleadings. The parties in this case had not pleaded or submitted that the contract in question had been frustrated. The defendants were thus highly prejudiced when the Court of Appeal decided on the issue of frustration. Therefore, the answer to the first question must be in the negative. (paras 18 & 19)

(2) According to the facts of this case, the parties had provided for a mechanism (or guideline) to determine the price viz. 'a price consistent with the prevailing market price'. The trial judge was correct in holding that the plaintiffs' claim was premature as the parties were bound by the agreement which they could have performed, albeit with some difficulty. The Court of Appeal was, hence, wrong in holding that the difficulty in interpreting the terms of the agreement amounted to frustration. It could not be so because the agreement clearly expressed the intention between the parties to the agreement to determine the price, namely, 'a price consistent with the prevailing market price'. The agreement was not frustrated since there was no impossibility of interpreting their intentions. It may be difficult, but not impossible. Therefore, the answer to the second question was also in the negative. (paras 27 & 28).

[39] To recapitulate, in the 1997 Suit, the High Court made a finding that the plaintiffs had conceded that they placed only one order for the first defendant's timber products by a sale contract dated 6 September 1997 resulting in the reduction of the amount owing to the plaintiffs. It was also in evidence before the High Court in the 1997 Suit (through the testimony of DW2) that that the first defendant's factory which had been producing the timber products closed down in July 1998.

[40] In the 1997 Suit, the High Court concluded that since the plaintiffs failed to comply with the terms stipulated in exh P2 within the set off period or within a reasonable time after the expiry and since it was not shown that the events that could have triggered the payment of cash had arisen, the claim should therefore be taken as premature. Essentially, the High Court ruled that the plaintiffs had prematurely filed their claim because it was never shown that the events that could have triggered the payment of cash had arisen.

[41] Before turning to the 2013 Suit, it is necessary to set out the critical dates, so that they are kept within the frame of our discussion:

(a) the letter of acknowledgement is dated 12 November 1996;

(b) the set off period expired on 11 September 1997;

(c) first defendant's letter dated 10 November 1997 where they admitted that they owed the plaintiffs a sum of RM5,431,454.87;

(d) the 1997 Suit was filed on 24 November 1997;

(e) the 1997 Suit was dismissed on 29 July 2000;

(f) on 28 May 2008, the Court of Appeal allowed the plaintiffs' appeal; and

(g) on 7 September 2009, the Federal Court allowed the defendants' appeal and reinstated the High Court's decision in the 1997 Suit.

The 2013 Suit

[42] Ordinarily the dust of conflict (per the 1997 Suit) should have settled in light of the decision of the Federal Court dated 7 September 2009. After a hiatus of about three years, the claim was resurrected by way of the issuance of a fresh order dated 23 October 2012 ('the fresh order') to the first defendant for timber products.

[43] It is not without significance that the fresh order was issued approximately 15 years (11 September 1997–23 October 2012) after the expiry of the set off period. The fresh order was purportedly issued pursuant to the letter of acknowledgement. There was no reply from the defendants and there was also no supply of the timber products pursuant to the fresh order. As a result, the plaintiffs issued a notice dated 31 October 2012 to the first defendant requesting the first defendant to ship the timber products as ordered, within 30 days from the date of the said notice. The 30 days period lapsed. The first defendant did not ship any timber products.

[44] As such the plaintiffs issued the letter dated 5 December 2012 to cancel the purchase order and demanded the immediate cash payment of the debt of RM6,223,241. The plaintiffs also sent a letter of demand to the second defendant via a letter dated 11 December 2012 apparently to trigger the second defendant's liability under the letter of undertaking.

[45] On 10 May 2013, the plaintiffs filed the 2013 Suit for the balance of the outstanding sum of RM16,859,186.65 on grounds that there was an admission of the debt, that there was a self-induced frustration, that the first defendants had a primary obligation to sell timber products, the fresh order had been issued and that there was in any event, unjust enrichment. The second defendant was sued as guarantor of the first defendant.

[46] The defendants filed their defence on 24 June 2013.

[47] In the defence the first defendant admitted receipt of the fresh order

(per letter dated 23 October 2012) and the notice dated 31 October 2012 for shipment to be made within 30 days.

[48] The first defendant also admitted receipt of the subsequent cancellation of the fresh order and the demand for payment of cash in lieu of the timber products via letter dated 5 December 2012. The second defendant also admitted receipt of the letter of demand dated 11 December 2012.

[49] However, the defendants denied liability.

[50] The defendants raised the plea of limitation. They also asserted that the four orders had to be placed within the set off period and that the fresh order is a sham as the plaintiffs knew that since July 1998, the first defendant no longer operated a sawmill. The defendants also claimed that the 2013 Suit was barred by res judicata. The plaintiffs filed a reply to defence on 8 July 2013 denying limitation and res judicata.

[51] On 20 August 2013, the defendants applied to strike out the 2013 Suit on grounds: (a) the fresh order was a sham as it seeks to trigger and/or revive a cause of action for cash payment of the outstanding sum which was no longer possible at that point in time; (b) that the action was barred by res judicata because a similar claim had already been adjudicated in the 1997 Suit; and (c) that the action was time barred pursuant to the Limitation Ordinance 1952 (Sabah Cap 72). The plaintiffs opposed the striking out order on the basis that res judicata does not apply as the merits were never considered in the 1997 Suit and that the 1997 Suit was found to be premature. Further, the plaintiffs argued that limitation does not apply because they had been actively pursuing the claim (per the 1997 Suit) without delay. On 11 March 2014 the High Court allowed the defendants' striking out application. The 2013 Suit was struck out and dismissed.

[52] On 14 March 2014, the plaintiffs filed an appeal to the Court of Appeal via Court of Appeal Civil Appeal No S-02–656–04 of 2014. The plaintiffs' appeal was allowed on 20 September 2016. The 2013 Suit was therefore reinstated.

[53] On 17 October 2016, the defendants filed an application for leave to appeal to the Federal Court against the Court of Appeal's decision. The defendants' application for leave was dismissed on 10 November 2017. Thereafter, the defendants filed an application to review the decision of the Federal Court under r 137 of the Rules of the Federal Court 1995, but the application was later withdrawn by the defendants.

[54] The 2013 Suit then proceeded to trial.

[55] On 11 June 2018, the judge dismissed the plaintiffs' claim.

High Court's findings (the 2013 Suit)

[56] The High Court's findings were as follows.

[57] On the issue of whether the 2013 Suit is caught by the doctrine of res judicata, the judge ruled that based on the principle of stare decisis, the plaintiffs' claim per their amended statement of claim dated 15 May 2017, is not caught by the doctrine of res judicata. According to the judge, he was bound by stare decisis since the Court of Appeal had allowed the plaintiffs' appeal in relation to the striking out application and reinstated the 2013 Suit. Later, the Federal Court dismissed the defendants' application for leave.

[58] As such, the judge held the view that the Court of Appeal and Federal Court had determined that res judicata had no application in this case and that he was bound by the outcome of the appeal in the Court of Appeal and the leave application in the Federal Court.

[59] On the question whether the plaintiffs' claim is time-barred under the provision of the Limitation Ordinance 1952 (Sabah Cap 72), the judge accepted the position that was articulated by plaintiffs' counsel that the 2013 Suit is not time-barred as parties were actively involved during the process of litigation in the 1997 Suit until it was finally decided by the Federal Court.

[60] Essentially, although not specifically articulated in the judgment, the judge seems to have taken the view that the period from 24 November 1997 (when the 1997 Suit was filed) until 7 September 2009 (when the Federal Court allowed the defendants' appeal and reinstated the High Court's decision dismissing the 1997 Suit) is to be 'excluded' from the computation of time on the basis that time (during that period) was 'suspended'.

[61] The next issue is whether based on the letter of acknowledgement and letter of undertaking, the first and second defendants are liable to pay the balance of the outstanding sum in circumstances where only one sale was completed.

[62] In this regard, the judge (without specifically identifying the exact quantum) found that although the debt was admitted, the mechanism for the payment thereof was based on the agreed term as per the letter of acknowledgement ie by way of contra and set- off against the purchase price of the sale and supply of timber products over the period of ten months. And based on the available evidence, the judge came to the conclusion that the defendants could not be liable to pay the balance of the outstanding sum as

A only one sale was concluded during the set off period.

[63] The next issue is whether during the set off period, there were in fact three other orders which had been placed by the plaintiffs in addition to the one concluded sale which had not materialised either because the first defendant refused to sell the timber products or the first defendant quoted a price that was not consistent with the prevailing market price.

[64] It was submitted for the plaintiffs that the reason why the parties could not proceed and conclude the sales was because of the first defendant's persistent refusal to sell and/or offering to sell at a price which was too high, ie at a price which was not consistent with the prevailing market price.

[65] Here the judge found that several enquiries were made by the plaintiffs for quotation of the price for the timber products from the first defendant but these cannot be considered as a formal offer by the plaintiffs to purchase the timber products because an offer to purchase can only be made once the parties have agreed on the pricing pursuant to the terms of the letter of acknowledgement.

[66] The judge made a finding that although the purported offer to purchase the timber products as shown by the documentary evidence were admitted as exhibits, it did not relieve the plaintiffs from the burden of proving its contents to the satisfaction of the court.

[67] On the issue of documentary evidence, the judge ruled that the documents were mere copies and the originals themselves were not produced during the trial and the contents were handwritten with Chinese characters and were illegible.

[68] The judge also held that the documents were not verified by the makers.

[69] On the issue of self-induced frustration, the judge was of the view the plaintiffs' complaint about the first defendant's failure to fulfil the three remaining orders for timber products can only be considered if it is first proven that there were indeed three further orders to purchase timber products from the first defendant.

[70] On the evidence that was adduced at trial, the judge found first that there is no evidence that there were three other orders. Further, there was no evidence that the first defendant refused to sell timber product and/or that they had quoted a price which was not consistent with the prevailing market price.

[71] There was also no evidence of any notices that had been given by the plaintiffs pursuant to cl 5 of the letter of acknowledgement. Thus, the judge concluded that the first defendant cannot be said to have failed to fulfil the plaintiffs' remaining orders. Hence, the judge concluded that the plaintiffs' allegation of self-induced frustration must fail.

[72] Next, the judge had to deal with the question whether the fresh order was a sham order? In this regard, the judge concluded that the fresh order was a sham order as it purportedly utilised the term under cl 5 of the letter of acknowledgement as a 'tactical manoeuvre' to claim for cash payment despite the fact that it was made beyond the timeline (ie after the expiry of the set off period) and despite the plaintiffs being aware that at that point in time when the fresh order was issued the first defendant's sawmill factory had already closed down.

[73] The judge also opined that in order to support their claim for cash payment of the outstanding debt pursuant to cl 5 of the letter of acknowledgement, the plaintiffs should have, but did not, exhibit the letter dated 23 October 2012 (ie the fresh order) and the notice dated 31 October 2012 for shipment to be made within 30 days.

[74] According to the judge, the other document which ought to have been produced was the plaintiffs' subsequent cancellation of the fresh order and demand for payment of cash in lieu of the timber products via letter dated 5 December 2012.

[75] Lastly, the judge opined that the plaintiffs ought to have also produced the letter of demand dated 11 December 2012 which was issued to the second defendant.

[76] The next issue that the judge dealt with is whether cl 2 of the letter of acknowledgement required the first defendant to first offer timber products for sale and then for the plaintiffs to purchase the timber products. This issue comes under the rubric of reciprocal obligations arising under the letter of acknowledgement.

[77] Essentially, the plaintiffs took the position that in light of the fact that the debt was expressly stated in the SSA and in the letter of confirmation dated 28 August 1996 and finally in the letter of acknowledgement, the first defendant had a pre-eminent obligation to give priority to sell timber products to the plaintiffs so as to settle the debt and in this context, the first defendant was to make the first move and make an offer to sell timber products to the plaintiffs, which the latter was to consider and agree to, subject to timber specifications, price etc.

[78] On the other hand, according to the first defendant's interpretation, the orders had to be first made by the plaintiffs before the first defendant can supply the timber products otherwise the first defendant would not be in a position to know what type of timber products or quantities that were required or needed by the plaintiffs at any particular point of time. As such, the first defendant said that the onus was on the plaintiffs to place/confirm the order after making the necessary enquiries.

[79] The next issue is whether the first and second defendants were unjustly enriched by reason of their non-payment of the monies which had been admitted to be due to the plaintiffs per the letter of acknowledgement. The judge rejected the claim based on unjust enrichment as he held that the nature of the claim was based on an admitted debt which was payable by way of contra payment and set off against the sale and supply of the timber products by the first defendant. The judge concluded that there was no payment by the first defendant because there was no sale of timber products which had been concluded between the first defendant and the plaintiffs. There was no act or delivery of thing that could be said to have been done gratuitously that had benefitted the first defendant.

[80] In so far as the dispute as to the actual amount which was outstanding, the judge said that there was no evidence to show that all expenses had been cleared or deducted before 12 November 1996. This seemed to imply that the judge was not inclined to accept that the deductions which had been by the first defendant per the statement of account annexed to their letter dated November 1997, was lawful.

[81] At any rate, the judge took the view that since the plaintiffs' claim could not be sustained, the issue on whether the balance of the outstanding sums due from the first defendant was RM6,223,241 or the reduced sum of RM5431,545.87, was inconsequential.

THE PLAINTIFFS' GROUNDS OF APPEAL

[82] The plaintiffs raised the following grounds in their amended memorandum of appeal ('AMOA'). The AMOA reads (verbatim) as:

Amended Memorandum Of Appeal

1. The learned Judge erred in fact and in law when he failed to consider that the first Respondent had an admitted debt in a letter dated 12.11.1996 ('said Letter') of RM10,134,000 ('said Debt') to the Appellants. The second Respondent had guaranteed the payment of the said Debt by a guarantee dated 12.11.1996 ('said Guarantee'). The said Debt was for monies owing to the Appellants as former directors prior to the sale of share agreement dated 12.11.1996 ('said Agreement')

between the Appellants and Liu Ho Tien. The said Agreement was for the purchase of 35% shares of 8,750,000 in the first Respondent company (then known as Veramax Sdn Bhd) ('said Company'). By reason thereof, the learned Judge misdirected himself on the first Respondent's pre-existing liability and prior duty in the said Agreement to complete the timber sales in the said Letter. Hence, the said Letter cannot be read in isolation.

1.a. The learned Judge erred in fact and law when he misdirected himself to dismiss as inconsequential the pleaded admission of the first Respondent and the said Guarantee by the second Respondent on the said Debt as follows:

> [148] As the Plaintiff's claim could not have been sustained for the reasons I have mentioned above, the issue on whether the outstanding debts due from 1st Defendant is in the sum of RM6,223,241 or on a reduced sum of RM5,431,454.87 can be considered to be inconsequential.

In particular, the learned Judge failed to consider that the pleaded admission by the first Respondent after the expiry of the 10 months period on 11.09.1997 was fatal to and inconsistent with his Lordship's finding that the issue of the said Debt is inconsequential.

1b. The learned Judge erred in fact and law when he directed himself to be bound by the confines of the said Letter as follows:

> [155] This is the position that I am holding tight and it remains so although there is nothing in the terms of the agreement to say that the said liability towards the outstanding debt shall be extinguished if there are insufficient orders made within the said 10 months' period.

In particular, the learned Judge simply disregarded the live issue of whether the said Debt of the first Respondent can be extinguished even though he was aware of this live issue.

1c. The learned Judge erred in fact and in law when he failed to consider the effect of the said Agreement on the issue of whether Clause 2 of the said Letter requires the first Respondent to first offer for sale and then for the Appellants to purchase the timber products. In particular, his Lordship's finding that '[126] I am more inclined to agree with the learned counsel for the Defendants' interpretation that orders have to be made first by the Plaintiffs before the first Defendant can supply the timber products ...' is inconsistent with the *contra proferentum* rule and the factual matrix of the pre-existing liability of the first Respondent. By reason thereof, the learned Judge had misapplied the law to the facts and this requires appellate intervention.

2. The learned Judge misdirected himself in fact and law when he failed to consider that cll 2 and 5 of the said Letter are to be read together and not in isolation in the context of the pre-existing liability of the first Respondent in the said Agreement. The learned Judge misdirected himself when he preferred to read clause 5 of the said Letter that '... supply any of the timber products ordered by you or ... order for such timber products being cancelled or ...' requires the Appellants to first make orders for timber products. The learned Judge had ignored the first Respondent's prior duty in clause 2 to '... we shall sell and you shall purchase timber products ...' and which prior duty to sell precedes the Appellants' duty to purchase.

In particular, the learned Judge failed to consider the lacunae in cll 2 and 5 of the said Letter as regards failure or refusal by the first Respondent to sell the timber products. By reason thereof, the learned Judge misdirected himself that the reciprocal duty of the parties and the natural construction of cll 2 and 5 of the said Letter requires the first Respondent to first make the offer to sell timber products and not for the Appellants to first make the order to purchase.

3. The learned Judge failed to consider that the first Respondent had unjustly enriched themselves by having already obtained the control and ownership of shares in the first Respondent under the said Agreement but ignoring the admitted pre-existing liability of the first Respondent to the Appellants in the said Letter.

In particular, his Lordship simply disregarded the undisputed fact that the first Respondent had obtained control of the said Company and obtained the benefit of the first Respondent's factory producing the timber products as follows:

> [133] I agree with the learned counsel for the Defendants that the Plaintiffs could not have succeeded in their claim based on the equitable principle of unjust enrichment as the nature of the claim in the present suit is different.

By reason thereof, the learned Judge misdirected himself in law on the Appellants' cause of action for unjust enrichment.

4. The learned Judge erred in fact and in law when he failed to consider that the totality of the first Respondent's evidence at the trial did not support their pleaded defence. In this respect, the first Respondent's witnesses were giving hearsay evidence and did not have first hand knowledge of the events stated in the documents. The authors of the documents did not attend trial to give evidence. By reason thereof, the learned Judge misdirected himself in law when he failed to consider that there was no evidence to support the Defence of the first Respondent.

5. The learned Judge erred in fact and in law when he held that '[62] Likewise, although the Plaintiffs' statement of claim was amended to include 'frustration' to enable the Plaintiffs to adduce evidence regarding the alleged 3 further orders which were rejected by the first Defendant due to self-induced frustration, they are still matters within the purview of the 1997 Suit ...'

The learned Judge had erred in excluding from the Suit No. TWU-22-18/5-2013 ('said Suit 2013') the evidence adduced in the 1997 Suit regarding three orders for timber products made by the Appellants but rejected because that the first Respondent had taken active steps to self-frustrate the performance of the said Letter for timber shipments by quoting very high prices inconsistent with the prevailing market rate, declining to quote prices because of no stock due to prior sales to other parties or that unfinished products are not allowed for export.

By reason thereof, the learned Judge failed to consider that the evidence in the 1997 Suit shows that the first Respondent ignored their prior duty to sell and this evidence has to be read together with the evidence in the said Suit 2013.

5(a). The learned Judge misdirected himself that the pre- existing liability of the first Respondent requires that the first Respondent first sells timber products at the same price as to their other customers. Further, that first preference for sale of timber

products be given to the Appellants and that there is no restriction on export of unfinished products to the Appellants.

By reason thereof, the learned Judge failed to consider that the first Respondent cannot just wait for the 10 months period to expire and must take active steps to fulfil their prior obligation to sell timber products to the Appellants.

5b. The learned Judge erred in fact and law when he failed to consider that the first Respondent chose to shut down the timber sawmill in July 1998 to deliberately disable themselves from performing their prior obligation in the said Letter. By reason thereof, the learned Judge failed to direct himself to consider that the first Respondent had caused self-induced frustration to the performance of the said Letter.

6. The learned Judge erred in fact and law when he failed to consider that the second Respondent had breached the terms of the said Guarantee to pay the balance of the said Debt together with accrued interest to the Appellants.

THE CROSS-APPEAL

[83] The defendants raised the following grounds in the notice of cross-appeal:

(a) the learned judicial commissioner erred in law and in fact in making a finding against the first and second respondent on the issue of res judicata raised by the first and second respondents on the reasons that the issue had been adjudicated or decided by the Court of Appeal and the Federal Court in favour of the first and second appellants when allowing their appeal against the decision of the High Court in allowing the action to be struck out under O 18 r 19 of the Rules of Court 2012 grounded on, amongst others, the issue of res judicata when the decisions of the said Court of Appeal and the Federal Court are clearly irrelevant and should not have been taken into consideration when adjudicating the issue in a full trial or trial proper;

(b) the learned judicial commissioner also erred in law and in fact in making a finding that the action filed by the first and second appellants against the first and second respondents is not caught by limitation under the provisions of the Sabah Limitation Ordinance as raised by the first and second respondents on the ground that the parties were in active litigation when such ground clearly could not in law suspend, adjourn or postpone the operation of the limitation period and does not fall within any one of the saving proviso or exceptions provided under ss 4 to 24 of the Sabah Limitation Ordinance;

(c) the learned judicial commissioner in considering the available evidence and submissions made by the parties in respect of the issues of res judicata and limitation raised by the first and second respondents during the trial ought to have ruled in favour of the first and second respondents on those issues; and

(d) ...

OUR FINDINGS

[84] This is indeed a unique case where the judge in the 2013 Suit had to consider and evaluate, not only the evidence that was presented in the trial before him but he also had to take a peek at the evidence that was adduced in the 1997 Suit. There were a multitude of issues that the judge had to deal with. Unfortunately, parties were not able to come up with common issues to be tried. But, in any event, the judge did the best he could and marshalled the issues and addressed them accordingly.

[85] The plaintiffs say that the judge had got the sequencing of issues all wrong and that this had resulted in the judge making erroneous conclusions. For our part, we see no substance in the complaint about a purported wrong sequencing of issues. Indeed, other than for chronological orderliness and structure of the judgment, we are not even certain why and whether sequencing of issues even matters.

[86] In our view, the multitude of issues which were raised had obfuscated matters. Ultimately, we felt that the appeal pivots on some crucial issues and the resolution of these issues would dispose of the appeal. Hence, we do not propose to deal with the multifarious issues that were canvassed during the trial and in the hearing of the appeal before us.

[87] The starting point is that plaintiffs' claim per the 2013 Suit is obviously for the balance of the outstanding sum, ie the sum of RM16,859,186.65 (RM6,223,241 + RM10,635,945.65) (as at 10 May 2013). There is no dispute as to the computation. However, there is a fundamental dispute as to whether the first defendant's deductions (as explained below) ought to be taken into account. The plaintiffs contend that the deductions ought not to come into the mix of the computation. The defendants say otherwise.

[88] At any rate, there is no dispute that at all material times the first defendant owed the plaintiffs the outstanding sum, ie RM10,134,000. This is in fact admitted via the first defendant's letter of acknowledgement. The outstanding sum was to be settled as per the terms as stated therein and it was to be done within ten months ie by 11 September 1997.

[89] The arrangement for payment in-kind gave the first defendant a 'window of opportunity' and a soft-landing to pay in the form of timber products. But the problem was in the details such as specification of timber and pricing. It seems quite apparent that the intention behind the letter of acknowledgement was to facilitate payment to the plaintiffs without placing

too much of a burden on the first defendant's cash flow.

[90] Hence, instead of paying in the form of hard cash, all that the first defendant had to do was to utilise their available stock of timber and meet the plaintiffs' requirements as and when they arose during the set off period.

[91] Essentially parties had agreed that there was to be payment in-kind by way of contra in the form of four shipments of timber products which were to be sold by 1st defendant (*and purchased by plaintiffs*) for an amount equivalent to the outstanding sum. In this regard, it is not unfair to say that the first defendant did not keep up with their side of the bargain per the letter of acknowledgement.

[92] The plaintiffs did not clinch any sale transactions with the first defendant other than the sale transaction dated 6 September 1997 pursuant to which the first defendant had shipped timber products to the plaintiffs and the outstanding sum (*according to the plaintiffs*) was reduced to RM6,223,241 (as at 27 October 1997). The plaintiffs contend that they were not able to clinch any other sale transaction with the first defendant. The balance of the outstanding sum is in dispute between the parties. The first defendant gives the figure of RM5,431,454.87 as at 15 September 1997.

[93] The judge felt that it was unnecessary to decide whether the amount due and owing (*after the shipment based on the sale transaction of 6 September 1997*), was RM6,223,241 or RM5,431,454.87. In this regard, there is no doubt that the first defendant's figure of RM5,431,454.87 is derived from a deduction of various expenses incurred by the first defendant which are apparently attributable to the plaintiffs.

[94] We note of course that in the first defendant's letter of 10 November 1997(*which is in response to the plaintiffs' legal letter of demand*), they acknowledged that they only owed a sum of RM5,431,454.87. This is because they unilaterally made deductions. There is no proof that the plaintiffs had agreed to this deduction. The plaintiffs' position is that they never agreed to any deductions.

[95] The issue is whether the first defendant was entitled to make the deductions from the balance of the outstanding sum so as to give a figure of RM5,431,454.87 as at 15 September 1997. Here we note that the terms of the letter of acknowledgement do not envisage any deductions whatsoever other than by way of contra/set off for sales of timber products as per the terms thereof.

[96] Thus, any other deduction which is done *sou motu* by the first

defendant (*as appears to have had happened here*) is invalid and is an unlawful deduction.

[97] As such, in our view the balance of the outstanding sum (as at 27 October 1997) is RM6,223,241.00. Hence, the plaintiffs' computation of RM16,859,186.65 (*RM6,223,241 + RM10,635,945.65*) (as at 10 May 2013) for purposes of the claim that was presented in the 2013 Suit is unimpeachable.

[98] Of course, that is only so far as the accuracy of the computation is concerned. But it is nevertheless our conclusion that the first defendant's letter dated 10 November 1997 is of itself an acknowledgement of the debt which was owing to the plaintiffs.

[99] And for the reasons that we discussed earlier, the first defendant's acknowledgement (or admission) must necessarily be read as relating to the balance sum of RM6,223,241 (as at 27 October 1997).

[100] Thus, whilst we are satisfied that the plaintiffs' computation in relation to the amount outstanding as at 27 October 1997 and as extrapolated to the amount claimed in the 2013 Suit, is forensically precise and correct, the relevant question is, whether having regard to everything that took place in the 1997 Suit and the sheer effluxion of time (until say 10 May 2013), the plaintiffs are legally entitled to maintain a claim against the defendants for the balance of the outstanding sum. We shall come to all of these matters shortly.

[101] For now, we think we should address one of the plaintiffs' key contention in the 2013 Suit, ie the issue of 'reciprocal promises'. In this regard, it was contended that the first defendant had a pre-existing liability towards the plaintiffs and a 'prior duty' to complete the sales of timber.

[102] In an attempt at giving context and substance to the reciprocal promises, it was argued for the plaintiffs that having regard to the wordings in cl 2 of the letter of acknowledgement, which reads, '… we shall *sell* and you shall purchase timber products …', the first defendant had a 'prior duty to sell' and this precedes the plaintiffs' duty to purchase.

[103] According to the plaintiffs, the first defendant had to make the first move and make an offer to the plaintiffs to sell timber products and it is only then that the plaintiffs become obliged to consider the offer and engage in discussions about price, quantity and other matters and finally, place the order via a purchase order. The judge declined to accept the plaintiffs' interpretation of cl 2 of the letter of acknowledgement.

[104] The judge looked at cll 2 and 5 of the letter of acknowledgement and concluded that the plaintiffs' interpretation is untenable. The judge took the view that the orders have to be made first by the plaintiffs before the first defendant can supply the timber products otherwise the first defendant would not be in position to know what types of timber products or their quantities that were required or needed by the plaintiffs at any particular point of time.

[105] The plaintiffs' complaint per the AMOA is that the judge 'misdirected himself that the reciprocal duty of the parties and the natural construction of cll 2 and 5 of the said Letter requires the first [defendant] to first make the offer to sell timber products and not for the [plaintiffs] to first make the order to purchase'. According to the plaintiffs, cl 2 gave rise to reciprocal promises.

[106] The argument for the plaintiffs is that the first defendant had the burden or obligation to first make an offer to supply or sell timber and it is only then that the plaintiffs will consider the offer and convey their acceptance and clinch a sale, which will then have to be fulfilled by way of a timeous shipment of the timber to the plaintiffs in Taiwan.

[107] It is significant to note that this argument was taken up only in the 2013 Suit, whereas in the 1997 Suit the plaintiffs said that they made several enquires for the purchase of timber products. In the 1997 Suit, the plaintiffs tried to suggest that they placed four orders, but they finally conceded, and it was found as a fact by the trial judge, that they only placed one order on 6 September 1997, which was fulfilled by the first defendant.

[108] But in the 2013 Suit, the plaintiffs appear to have changed the narrative and interpreted cl 2 as imposing a burden or obligation on the first defendant to first make the offer. The judge rejected the plaintiffs' interpretation. In our view, rightly so. As such, we reject the plaintiffs' suggestion that the judge had erred in his interpretation of cll 2 and 5 of the letter of acknowledgement.

[109] When looked at in totality, cll 2 and 5 convey quite clearly and in a common-sense way, that as the consumer or end-user, the onus is on the plaintiffs to make enquiries (*which they did*) and thereafter to place the order.

[110] As to the placing of the order, it seems that they only placed one order (see: judgment in the 1997 Suit). Whilst we accept that the first defendant had a pre-existing liability and perhaps even a prior duty to complete the sales of timber during the set off period, we cannot agree that the first defendant had the primary obligation to make the initial offer to the plaintiffs.

[111] Indeed, the first defendant would not be able to make any offer unless

A they first know what the timber products are required by the plaintiffs. Again, it is important to emphasise that during the set off period the plaintiffs did in fact make several enquiries. However, only one sale was concluded.

B **[112]** During the 1997 Suit, the plaintiffs said that they could not conclude any other sale because parties could not agree on price. For completeness, it should be mentioned that during the 1997 Suit it was suggested to the plaintiffs during cross-examination that the plaintiffs did not relentlessly pursue the placing of orders for the sale of timber products as they (the plaintiffs) were just waiting for the set off period to expire and to then claim payment in cash.

C

[113] We do not agree that the plaintiffs had engaged in any such conduct. The fact is that they did make several enquires. But the sale did not come into fruition. There was no agreement on price. And it was also suggested during cross-examination of the plaintiffs that that there was no evidence that the first defendant had refused to sell timber products.

D

[114] It was also suggested and eventually established that there is no contemporaneous evidence or paper trail to demonstrate that the plaintiffs had complained to the first defendant that they had stymied the plaintiffs' efforts to place orders for the sale of timber. The plaintiffs said that during the set off period they 'verbally complained' to the first defendant about their refusal to sell timber.

E

F

[115] The judge was not impressed with the plaintiffs' evidence in this regard. Indeed, it is important to note that PW1's answer to the question which was asked during cross-examination, 'you are not entitled to ask for the outstanding sum to be paid by cash payment unless the first defendant failed, refused or neglected to supply you with timber products ordered by you or if any of the timber products supplied by the first defendant is not in accordance with the specifications stated in the purchase order as per Clause 5 of the letter of acknowledgement' was, 'I agree'.

G

H **[116]** Of course, during the trial, the plaintiffs did articulate that there were at least three occasions when the first defendant 'refused' to sell timber products to the plaintiffs and the examples of these inchoate sale transactions are the transaction dated 27 December 1996 when the first defendant agreed to an initial price quotation and later (9 January 1997) refused to sell the products to the plaintiffs. Instead the timber was sold to a third party.

I

[117] The plaintiffs were therefore not given the priority that they were entitled to. The plaintiffs also referred to the sale transactions which were to have been concluded on 4 January 1997 and 19 August 1997 as examples of the

first defendant's refusal to sell timber products.

[118] In this regard, the plaintiffs have taken umbrage with the fact that the judge had not taken into account the first defendant's conduct vis a vis the three orders which did not come into fruition due to the first defendant's conduct.

[119] The plaintiffs' specific complaint is that the judge had erred in excluding the evidence adduced in the 1997 Suit regarding three orders for timber products made by the plaintiffs but which were apparently rejected because that the first defendant had taken active steps to self-frustrate the performance of the letter of acknowledgement for timber shipments.

[120] The self-frustrating conduct is based on the first defendant's conduct in quoting very high prices and at any rate, prices which are inconsistent with the prevailing market rate and in declining to quote prices because of no stock due to prior sales to other parties or in giving the excuse that unfinished products are not allowed for export.

[121] The judge took the view that this aspect of the plaintiffs' complaint was subsumed in the evidential matrix of the 1997 Suit. From our perspective, we have difficulty with this part of the plaintiffs' complaints because these relate to evidence of the first defendant's conduct that was relevant to the 1997 Suit. The difficulty is compounded by the fact that the 2013 Suit is pre-eminently, unmistakably, and unequivocally predicated on the fresh order. We will deal with the validity of the fresh order in a while.

[122] At any rate, for what it is worth, the letter of acknowledgement had contemplated that the contra arrangement is to be completed within ten months that is by 11 September 1997. But, it appears that although the first defendant was indebted to the plaintiffs and had contractual obligations to settle the debt by way of sales of timber products to the plaintiffs as per the contra arrangement, they nevertheless failed to give priority to the plaintiffs and instead sold a huge quantity of lumber core to a third party (9 January 1997). This demonstrates first defendant's intention not to comply with or co-operate with the plaintiffs to ensure that the contra arrangement is fulfilled within the set off period. We may therefore safely conclude that the contra arrangement did not fully materialise because of utter non-cooperation and non-compliance by the first defendant. In this context, it without a doubt that the best person to explain why there was non-compliance is Bobby Yeap. But he did not testify at both trials.

[123] Ultimately the contra arrangement just did not work. On hindsight, it was of course perilous for the plaintiffs to have gone along with the arrangement as per the letter of acknowledgement. They claimed that they had

no choice and were forced into it. But there is no evidence of that. And it is not the plaintiffs' case that they were under duress.

[124] In fact, the evidence shows that the plaintiffs tried to comply with the terms of the letter of acknowledgement. But they fell short of placing the requisite orders so as to trigger the cash payment obligation per cl 5 of the letter of acknowledgement.

[125] Any which way that one looks at the issue, it is clear that there was only one order that was placed albeit that there were many enquiries. And it is quite significant that there was not a shred of evidence by way of any paper trial to suggest that the plaintiffs had ever complained that the first defendant had quoted prices which were not consistent with the prevailing market price and/or declined to quote prices because of no stock due to prior sales to other parties.

[126] As such, on the issue as to who should make the first move in respect of the so-called reciprocal promises, we do not think that it really matters as ultimately the plaintiffs did not purchase any timber products per the letter of acknowledgement, save for one order (6 September 1997) which (as we have concluded above) reduced the debt to RM6,144,489.

[127] Thus, as a result, it was the conclusion of the trial judge in the 1997 Suit and later, the judge in the 2013 Suit, that the plaintiffs were not entitled to cash payment otherwise on the happening of the events as envisaged under cl 5 of the letter of acknowledgement.

[128] Again, it is necessary to emphasise that in the 1997 Suit, the trial judge in that case had made a clear and unambiguous finding of fact that 'there was only one order made out of the four orders contemplated. In fact, the first plaintiff (PW1) said that there was no other order made since the price could not be agreed upon'.

[129] A little further in his judgment, the trial judge said, '… And although PW1 said that they had no choice but to agree since they were eager for the payment, nevertheless, I am of the view that having taken that position it would have been a matter of observing the terms therein. Nothing could have prevented them from placing their orders and waiting for the first defendant to meet them'.

[130] And finally, the trial judge concluded by saying, '… since the plaintiffs failed to comply with the terms stipulated in exh P2 within the time specified or within a reasonable time after the expiry and since it was not shown that the events that could have triggered the payment of cash had arisen the claim

should therefore be taken as *premature*.

[131] The next issue is that in the 2013 Suit, the defendants took the position that after the expiry of the set off period, the debt ipso facto became extinguished. The judge did not think so. We too do not think so. In fact the issue was previously ventilated in the 1997 Suit and the trial judge had clearly stated that the debt was still alive and was not extinguished by some sort of a contractual abridgment of the limitation period. In the 1997 Suit, the trial judge opined, quite correctly, that the debt did not vanish or extinguish by sheer effluxion of time. He said, 'In any event I should think that the imposition of the time frame in exh P2 for the plaintiffs to place their orders does not necessarily mean that the same has become a limitation period for the parties in the sense that the claim would be automatically barred on expiry of that period'.

[132] This suggests that although the terms as contemplated by the letter of acknowledgement had not come into fruition, the obligation to pay the debt still existed. It remained extant and alive subject only to the period of limitation as provided under the Limitation Ordinance 1952 (Sabah Cap 72).

[133] Before dealing with the limitation point, it is necessary for us to deal with the plaintiffs' contention here and below, that they are entitled to mount a fresh claim based on the fresh order as they come within the principle that was enunciated by the Court of Appeal (per Gopal Sri Ram JCA — as he then was) in *The Pacific Bank Bhd v Chan Peng Leong* [1998] 2 MLJ 613; [1998] 2 CLJ 440; [1998] 1 MLRA 81; [1998] 2 AMR 1895 (CA) which permits the filing of a fresh action. The facts of *The Pacific Bank* case (per MLJ synopsis) are as follows.

[134] On 4 October 1988, the appellant ('the bank') commenced an action against the respondent ('the guarantor') and five other defendants for the recovery of monies owed it ('the first action'). The guarantor was *sued on a guarantee which he had given which was enforceable 'on demand'*. The bank obtained judgment against all the other defendants in the first action.

[135] The guarantor applied to strike out the bank's statement of claim on the ground that no proper demand had been made of him. He attacked the contents of the letter which made the demand. The High Court held the demand to be bad and the first action vis a vis the guarantor, was accordingly struck out.

[136] On 26 March 1994, the bank made a fresh demand of the guarantor. The guarantor did not make payment and the bank sued him again ('the second action'). The guarantor applied to strike out the second action as well.

A **[137]** The guarantor did not question the validity of the new demand but argued that the decision in the earlier action had rendered the dispute res judicata so that the bank could not re-agitate its claim against him under the guarantee he had given. The judge agreed with the guarantor's argument and struck out the second action. The bank appealed against that decision.

B

[138] The issue in the appeal was whether the bank, having given a demand, which, by judicial determination, was found to be defective, can issue a fresh demand in order to enforce the guarantee given by the guarantor.

C

[139] Counsel for the guarantor argued that the position would have been different if the bank had withdrawn the first action with liberty to file afresh. He contended that in such an event the bank could have brought the second action based upon a fresh letter of demand. It could not do so in the present
D circumstances since it went forward with its case in the first action. The bank's appeal was allowed.

[140] The Court of Appeal said that the point in issue in the first action that was determined necessarily and with precision was that the demand upon
E which that action was based was invalid. There was, in other words, no demand. The first action had, therefore, been commenced prematurely.

[141] Significantly, Gopal Sri Ram JCA held that, if one action on the guarantee is dismissed because no demand was made, this does not bar recovery
F of the same amounts under the guarantee in a second action. He therefore held that the bank was at liberty to issue a proper demand and to institute proceedings to enforce the guarantee based upon that demand and that neither res judicata, nor issue estoppel, nor cause of action estoppel operated to bar the
G second action.

[142] Consequently, the Court of Appeal opined that the second suit cannot be dismissed on the basis that it is brought in respect of the same cause of action because, in the absence of a demand, no cause of action arose when the first
H proceedings were issued. Thus, the judge was wrong in striking out the second action as it was based upon an entirely fresh demand which is not under attack.

[143] Our comment on *The Pacific Bank* case is as follows. The first letter of demand under the guarantee was defective and the suit which was predicated
I on the defective demand was held to be 'premature'. This was because there was no proper demand. Hence, there was in law, no valid cause of action. Thus, all that the bank had to do was to issue a fresh demand (which they did) and thereby crystallised a valid and proper cause of action under the guarantee. Indeed, the second letter of demand was valid. Here, the fresh order which was

issued on 23 October 2012 was inherently flawed and eventually found to be a 'sham'. A

[144] It was contended for the plaintiffs in the present appeal that the 1997 Suit stands on the same footing as *The Pacific Bank* case and that the plaintiffs are similarly entitled to mount a fresh suit. Thus, it was contended that with the issuance of the fresh order, the plaintiffs are entitled to mount a fresh suit against the defendants. We find that there are two problems with the plaintiffs' argument. First, the judge had made an unequivocal finding of fact that the fresh order is a 'sham'. He came to that conclusion because the plaintiffs were fully aware (via the trial of the 1997 Suit) that the first defendant had ceased to operate the sawmill by July 1998. The evidence in this regard was adduced in the 1997 Suit. B C

[145] As such, the plaintiffs were fixed with knowledge that by July 1998 the first defendant had ceased to operate the sawmill. The plaintiffs now suggest that the closure of the sawmill is part of the first defendant's 'self-induced frustration' to thwart any compliance with the implementation of the terms of the letter of acknowledgement. D

[146] With respect, there is really no evidence that the closure of the sawmill was contrived as part of the first defendant's nefarious plan as suggested by the plaintiffs. We have examined the AMOA and find that the plaintiffs have not made any specific attack against the judge's finding that the fresh order is a sham. E F

[147] The next point we will make as to the 1997 Suit being 'premature' is that the word premature which was used by the trial judge to describe that suit was perhaps somewhat of a misnomer. Our understanding is that the 1997 Suit was not premature in the sense as described or envisaged in *The Pacific Bank* case. G

[148] In *The Pacific Bank* case the first action was premature because the letter of demand was defective and therefore there was no cause of action pursuant to the on-demand guarantee. H

[149] Here, the word 'premature' which was used by the trial judge to describe the 1997 Suit was not and could not have been used in the same sense. To recapitulate, in the 1997 Suit the plaintiffs had filed the action based on the letter of acknowledgement and the trial judge concluded, 'since the plaintiffs failed to comply with the terms stipulated in exh P2 within the time specified or within a reasonable time after the expiry and since it was not shown that the events that could have triggered the payment of cash had arisen the claim should therefore be taken as premature'. I

[150] To us, the trial judge's opinion simply means that the claim based on the letter of acknowledgement was unsustainable or untenable. It certainly does not mean that the contra/set off mechanism for payment (which was time-sensitive) can be resurrected by the issuance of the fresh order, which in any event has been found to be a sham.

[151] As mentioned in the early part of this judgment the fresh order was issued on 23 October 2012, which is about three years after the decision of the Federal Court had been delivered in respect of the appeal arising from the 1997 Suit and about 15 years after the expiry of the set off period.

[152] Looking at all the circumstances it is not surprising that the judge had concluded that the fresh order was a sham. We do not intend to say anything more than what we have already articulated about some of the crucial issues which have arisen in the course of this appeal. We will now deal with the issue of limitation.

[153] The judge decided that the 2013 Suit was not time-barred and justified his conclusion on the basis that parties were actively involved in the process of litigation in the 1997 Suit. He emphasised that the 1997 Suit was filed on 22 November 1997 and was finally decided on 7 September 2009 by the Federal Court. What may be gleaned from the finding of the judge is that he appears to have agreed with the plaintiffs' position that the six years limitation period was suspended, adjourned, or postponed and thus must be excluded in the calculation for the limitation period.

[154] The first question is: what is the relevant period of limitation? The next question is: was the limitation period legally suspended?

[155] The other point to note is that any action which is time-barred, ie outside the limitation period shall be dismissed. This is clearly provided for in s 3 of the Limitation Ordinance 1952 (Sabah Cap 72) which states that 'Subject to sections 4 to 24, every suit instituted after the period of limitation prescribed therefor by the Schedule shall be dismissed: Provided that limitation has been set up as a defence'.

[156] Next, under item 95 of the Schedule to the Limitation Ordinance 1952 (Sabah Cap 72) ('the Schedule') the period of limitation for a claim based on breach of a contract (in writing) is six years.

[157] The plaintiffs' claim in the 2013 Suit is based on the letter of acknowledgement and this is therefore akin to a contract in writing. It thus falls within item 95 of the Schedule to the Limitation Ordinance 1952 (Sabah Cap 72) which states that the limitation period is six years and that time runs from

'when the period of limitation would begin to run against a suit brought on a similar contract not in writing'.

[158] And in so far as the claim based on 'unjust enrichment' is concerned, it falls within the omnibus provision, ie item 97 of the Schedule which covers suits for which no period of limitation is provided elsewhere. The period of limitation under item 97 is also six years and time begins to run when the cause of action arises, ie 'when the right to sue accrues'.

[159] Next, it is imperative to determine whether the cause(s) of action were 'suspended' as a matter of law. Before we get into the topic of 'suspension' of the limitation period, we think should first deal with the submission that was made by counsel for the plaintiffs — that based on the defendants' conduct they should be precluded from raising the plea of limitation.

[160] The principle is that in certain circumstances a party may be estopped from raising the defence of limitation. The principle in this regard was stated lucidly by Edgar Joseph Jr J (as he then was) in *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202; [1989] 1 CLJ Rep 219; [1989] 1 CLJ 693 (HC) at p 245.

[161] The circumstances which may give rise to an estoppel would include a case where the plaintiff has been 'induced' by the defendant's representations or conduct which caused the plaintiff to delay the filing of legal action.

[162] Whilst we do not doubt the principle that in certain circumstances a party may be estopped (and therefore precluded) from raising the defence of limitation, we do not agree that the plaintiffs in the present case can rely on estoppel as this was neither pleaded nor put to the defendants during the trial. In any event, having examined the record, we do not see anything in the defendants' conduct which remotely suggests that they had acted in such a way as to induce or encourage the plaintiffs in any particular way vis a vis the 1997 Suit or the 2013 Suit. Thus, the decision to file the 1997 Suit and to present the claim in the manner that they did, and which resulted in the suit being dismissed cannot by any stretch be attributed to the defendants. Indeed, it is the plaintiffs who had carriage of the 1997 Suit just as they had carriage of the fresh order (which has been impugned as being a sham) and the 2013 Suit. Thus, there is no basis for the plaintiffs' suggestion that the defendants are precluded from raising limitation.

[163] We now propose to deal with the issue of 'suspension' of the limitation period. This is plainly covered by s 14 of the Limitation Ordinance 1952 (Sabah Cap 72).

[164] Section 14 of the Limitation Ordinance 1952 (Sabah Cap 72) ('s 14') provides:

> In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or in an appellate court, against the defendant shall be excluded where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a court which, *from defect or jurisdiction or other cause of a like nature, is unable to entertain it*.
>
> Explanation 1 — In excluding the time during which a former suit was pending, the day on which that suit was instituted and the day on which the proceedings therein ended shall both be counted.
>
> Explanation 2 — A plaintiff in resisting an appeal presented on the ground of want of jurisdiction shall be deemed to be prosecuting a suit within the meaning of this section. (Emphasis added.)

[165] The plaintiffs sought to rely on s 14 on the basis that they filed the 1997 Suit on 24 November 1997 and the judgment in that suit was given on 29 July 2000. The 1997 Suit was held to be 'premature' and the plaintiffs' claim was dismissed. The plaintiffs' appeal to the Court of Appeal was allowed by the Court of Appeal on the 29 March 2007. The defendants appealed to the Federal Court which allowed the appeal on 7 September 2009 and reinstated the High Court's decision. Counsel for the plaintiffs argued that the fact that the 1997 Suit was ruled as being 'premature' somewhat brings the facts here within the frame of s 14.

[166] However, it was argued for the defendants that the language used in s 14 is plain and clear and it is not applicable to the facts of the present case because it only applies where the court (in the first instant or the appellate court) has no jurisdiction to adjudicate the claim.

[167] Counsel for the defendants said that there is no issue of jurisdiction or defect of jurisdiction when the plaintiffs were prosecuting the 1997 Suit. It was also contended for the defendants that the High Court, the Court of Appeal and finally the Federal Court had power and jurisdiction to adjudicate the claim and the appeals respectively.

[168] We agree with the submissions that were made by counsel for the defendants. We find that there is no evidence to show that the 1997 Suit had been prosecuted in courts which were devoid of jurisdiction to adjudicate the claim and thereafter, the appeals. Counsel for the plaintiffs said that the fact that the trial judge had ruled that the 1997 Suit was premature brings it within the ambit of s 14. We do not think so.

[169] As mentioned earlier, the description 'premature' merely exemplifies the fact that the plaintiffs had not complied with the terms of the letter of acknowledgement (cl 5) so as to trigger the first defendant's obligation to pay in cash. That of itself has nothing to do with the court's jurisdiction. It merely means that the plaintiffs had not made out their case for purposes of the claim which was predicated on the letter of acknowledgement.

[170] In *Capital One Ltd v EC Corporate Management Inc & Ors* [2013] 1 LNS 817; [2013] 6 AMR 639 HC the plaintiff also relied on s 14 and submitted that the time between the institution of Suit 19 in 2005 and the date of judgment in May of 2011 should be excluded.

[171] The High Court rejected the argument and stated, 'In my view, s 14 cannot assist Capital One Ltd to extend the limitation period for the reason that the proceedings in Suit 19 did not suffer from any defect in jurisdiction or other cause of like nature. In fact, the High Court had proceeded to give a final judgment on the merits in Suit 19 ...'.

[172] Just as the High Court in *Capital One* had found that there was no jurisdictional defect, we too are similarly inclined to the view that there was no jurisdictional or any defect of like nature which would trigger the applicability of s 14. The reality of the matter was that there was no jurisdictional issue (defect) whatsoever with regard to the 1997 Suit.

[173] As such, to round off on the s 14 point, our conclusion is that there was no defect in the jurisdiction of the courts in respect of the 1997 Suit and appeals which arose therefrom. Further, the trial judge's description that the 1997 Suit was 'premature' does not in any way fall within the ambit of s 14. As such, we do not agree that the period of limitation was 'suspended' and s 14 cannot therefore be relied upon by the plaintiffs to overcome the issue of limitation which had been raised by the defendants in their defence. The s 14 point is in our view, totally unsustainable.

[174] Hence, in the ultimate analysis, it was erroneous for the judge to have ruled that the period of limitation was suspended. Therefore, for purposes of the limitation issue the germane question which the judge ought to have asked himself was, when is the earliest point in time that the plaintiffs could have brought an action in respect of the debt?

[175] The judge ought to have also kept in mind the salutary principle that once defendants had raised the defence of limitation, the burden of proving that the action was brought within the limitation period shifts to the plaintiffs (see *Mohd Sari bin Datuk Okk Hj Nuar & Ors v Asia General Equipment and Supplies Sdn Bhd & Ors* [2010] 5 MLJ 766; [2010] MLJU 287 (CA) and *Ong*

Ah Bee v Hii Chung Siong, Robin [1993] 1 CLJ 504; [1992] 3 MLRH 428 (HC)).

[176] The principle in this regard was stated in the speech by Lord Pearce in *Cartledge (Widow and Administratrix of The Estate of Fred Hector Cartledge (deceased)) and Others v E Jopling & Sons, Ltd* [1963] 1 All ER 341 (HL), where he said (p 352), 'when a defendant raises the statute of limitation the initial onus is on the plaintiff to prove that his cause of action occurred within the statutory period'. And in this context, we do not think that it matters whether the plaintiffs' claim is based on a contractual debt or a claim based on unjust enrichment as the period of limitation is six years for both.

[177] Hence, the important question is when did the cause(s) of action accrue to the benefit of the plaintiffs? In this regard, it is relevant to refer to the recent decision of the Court of Appeal (per Suraya Othman JCA) in *Dato' Ahmad Johari Tun Abdul Razak v A Santamil Selvi Alau Malay & Ors And Other Appeals* [2020] MLJU 562; [2020] 7 CLJ 588; [2020] AMEJ 0409 (CA), where all the relevant cases on 'cause of action' were comprehensively examined.

[178] Thus, following the various examples that were referred to in *Dato' Ahmad Johari*'s case, a cause of action arises 'when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed'. According to the Court of Appeal, the cause of action in relation to the right to sue for recovery of a debt 'arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute (of limitation) runs from the earliest time at which an action could be brought'.

[179] As stated earlier, the period of limitation for a cause of action for breach of contract (in writing) is six years (per item 95 of the Schedule). And the limitation period for a cause of action for unjust enrichment is also six years (per item 97 of the Schedule). In the context of the claim for unjust enrichment, it is relevant to mention that the claim is for restitution.

[180] In *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 AMR 601; [2015] AMEJ 319; [2015] 2 CLJ 453 (FC) the Federal Court enunciated [117] that '... a cause of action in unjust enrichment can give rise to a right to restitution where it can be established that the (a) the party must have been enriched, (b) the enrichment must be gained at the claimant's expense, (c) that the retention of the benefit was unjust, and (d) there must be no defence available to extinguish or reduce the party's liability to make restitution'.

[181] As opined by the judge, the claim that was presented in the 2013 Suit is for payment of the balance of the outstanding sum. The plaintiffs' claim does not in our view, satisfy the elements for a cause of action for unjust enrichment. In any event, even if we were to entertain the (highly doubtful) possibility that the plaintiffs could validly mount a claim for unjust enrichment, the plaintiff would still be thwarted by reason of the expiry of the six years limitation period.

[182] In our view, given that the High Court in the 1997 Suit had dismissed the plaintiffs' claim as premature and since the contra arrangement had failed, there was a debt which was still due and owing and which could be pursued in the form of a fresh suit. As for the computation of time, we are of the view that in the circumstances of this case, taking it at its highest, the latest date is 10 November 1997 (which is the first defendant's letter in reply to the plaintiffs' solicitor) and on this basis the claim was time-barred by 9 November 2003. However, in this case, the 2013 Suit was filed on 10 May 2013 which is almost ten years after the action was time-barred.

[183] We had earlier opined that the limitation period was not suspended pursuant to s 14. And further, s 3 of the Limitation Ordinance 1952 (Sabah Cap 72) provides that 'Subject to sections 4 to 24, every suit instituted after the period of limitation prescribed therefor by the schedule shall be dismissed: Provided that limitation has been set up as a defence'.

[184] As such, it is clear that the defendants' plea of limitation ought to have succeeded as the plaintiffs' present suit was filed about ten years after the action was already time-barred. In the circumstances and for the reasons that we have articulated, we are inclined to agree with the respondents' cross-appeal vis a vis the limitation point.

[185] The next issue which we will deal with has to do with the fact that the defendants had previously applied to strike out on the grounds of, inter alia, limitation and res judicata which was allowed by the High Court and the 2013 Suit was accordingly struck out. On appeal by the plaintiffs, the Court of Appeal allowed the plaintiffs' appeal and reinstated the 2013 Suit. The defendants' application for leave to appeal was subsequently dismissed by the Federal Court. The judge took the view that he was bound by stare decisis and that he was bound by the decision of the Federal Court which had dismissed the defendants' application of leave and thereby upholding the dismissal of the application to strike out.

[186] The judge declined to consider the issue of res judicata which had been raised in the striking out application and which had not been abandoned. In fact the plea of res judicata was clearly extant, alive and quite central to the defendants' position in opposing the 2013 Suit.

[187] The judge seemed to think that since the striking out application had failed previously, therefore the issue(s) is/are barred by res judicata. In our view, the correct principle is that interlocutory decisions generally do not give rise to res judicata (see the decision of Justice Azizah Nawawi in *Code Brilliant Sdn Bhd (in liquidation) & Ors v Heng Ji Keng & Ors* [2013] 9 MLJ 212; [2012] 1 LNS 873 (HC)).

[188] We also have in mind the important decision of Justice Edgar Joseph Jr in *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90; [1988] 1 CLJ Rep 435; [1988] 2 CLJ 35 where the principle of res judicata was discussed. In that case, the court held that issues raised at the interlocutory (injunction) stage are not res judicata and may be subsequently taken up at the substantive stage. At p 93 Justice Edgar stated:

> Firstly, it is trite law that for a judicial decision to operate as res judicata it must be final in the sense that it leaves nothing to be judicially determined or ascertained thereafter in order to render it effective and capable of execution, and is absolute, complete, and certain, and when it is not lawfully subject to subsequent rescission, review or modification by the tribunal which pronounced it. The true test of res judicata in its wider sense or issue estoppel may be stated thus: has there been a final determination of the issue? That is the crucial factor.

[189] Of course, exceptionally in certain circumstances, a decision in an interlocutory matter could give rise to res judicata. In this regard, we have not lost sight of the seminal decision of Gopal Sri Ram JCA (as he then was) in *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57; [1997] 2 CLJ 104; [1996] 2 AMR 1457 (CA).

[190] In *Hartecon*, the respondent filed proceedings to set aside the arbitrator's award. The appellant filed an application via a Motion for certain declarations in regard to the arbitration award. The respondent raised a preliminary objection ('the PO'). The PO was that the appellant ought to have filed a substantive Originating Summons or Writ to obtain the declarations and the Motion is not the proper route. The judge dismissed the PO. When the Motion came up for hearing (on merits), the respondent resurrected the PO and invited the judge to re-visit the issue. The judge did so and this time decided to allow the PO. The appellant appealed to the Court of Appeal and contended that res judicata applied in regard to the judge's first decision to dismiss the PO.

[191] Speaking for the Court of Appeal, Justice Gopal Sri Ram said that once a judge makes a ruling, substantive or procedural, final, or interlocutory, it must be adhered to and may not be reopened. In amplification, it was enunciated that although the first decision was made on an interlocutory matter which was purely procedural in nature, it was nevertheless binding on

the court and on all parties to the lis until its reversal on appeal. The decision of the judge overruling the respondent's preliminary objection rendered the point taken res judicata.

[192] We accept the correctness of the decision in *Hartecon.* But we feel compelled to state that that the *Hartecon* jurisprudence does not apply to a decision which is devoid of any finality, such as the dismissal of the striking out application. This is because the dismissal of a striking out application does not mean that the issue which is the subject matter of the application has been determined with 'finality'. In fact nothing has been decided. Indeed, what can be gleaned or inferred from the dismissal of the striking out application is that it is not a clear-cut case for striking out and the court is not able to determine the issue summarily on affidavits and that the matter (for whatever reason) may require *viva-voce* evidence or the issue is one which warrants further argument or mature consideration at a trial.

[193] Indeed, the position in this regard was stated with clarity by the Federal Court in *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1; [2016] MLJU 12; [2016] 3 CLJ 1; [2016] 1 LNS 39; [2016] 2 MLRA 263 FC (per Ramly Ali FCJ) where it was posited [27], '... A striking out order should not be made summarily by the court if there is issue of law that requires lengthy argument and mature consideration. It should also not be made if there is issue of fact that is capable of resolution only after taking viva voce evidence during trial ...'.

[194] Finally, it is necessary to refer to the Federal Court's decision in *Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim* [2015] 3 MLJ 609; [2015] 2 CLJ 1037; [2015] 2 AMR 124 (FC) in relation to the issue of res judicata.

[195] In that case, the defendant raised the plea of limitation in the defence. They then applied to strike out the suit. The application went before the registrar, who dismissed the application to strike out. The defendant did not appeal against the registrar's decision. At the trial the plaintiff asserted that the defendant was 'precluded' from relying on limitation. The issue before the Federal Court was whether the issue of limitation was res judicata because there was no appeal from the decision of the registrar in dismissing the defendant's application to strike out the claim on the ground that it was time-barred.

[196] The Federal Court referred to *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783; [1995] 1 MLRA 611; [1995] 3 AMR 2559 (SC) and restated that as a matter of general principle when a matter has been adjudged by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more

the res judicata because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth.

[197] The Federal Court then quoted from the decision of the Court of Appeal which held that, '... the fact that the application was refused does not necessarily imply that the application was refused because the appellant failed to prove the defence of limitation. It is conceivable that the application was refused because the learned registrar was of the opinion that there had to be a trial of the action before the court could determine whether the respondent's claim was defeated by limitation ...'.

[198] Ultimately, the Federal Court agreed with the Court of Appeal and held that the defendant was not precluded from relying on the defence of limitation.

[199] It is therefore clear that the defendants' application to strike the 2013 Suit (which was predicated on, inter alia, res judicata) which was eventually dismissed, did not preclude the issue of res judicata from being ventilated at the trial. The judge said that the decision of the Court of Appeal which allowed the plaintiffs' appeal and which reinstated the suit and the decision of the Federal Court disallowing the first defendant's application for leave to appeal were 'binding' on him and that based on 'stare decisis' he could not go against the ruling of the Court of Appeal and Federal Court. On that premise he felt bound to dismiss the plea of res judicata as being inapplicable.

[200] Thus, for the purposes of the defendants' plea of res judicata, we undertook a careful examination of the grounds of judgment of the 1997 Suit and it was clear that all issues in dispute in the 1997 Suit were considered by the trial judge in that suit. The High Court had considered, inter alia, whether the defendants were liable under the letter of acknowledgement and the letter of undertaking respectively.

[201] This may be gleaned from the judgment of the trial judge which reads: 'I have also considered the other points raised by the respective counsel for the parties but I am of the view that my findings on them will not change the conclusion that I have arrived at herein. Accordingly, as it is my finding that the claim of the Plaintiffs is premature in the light of the contents of Exh P2 (which is the said letter of acknowledgement) the inevitable conclusion is that this claim against both the Defendants must be dismissed with costs to be taxed unless agreed'.

[202] We noted that the cause of actions in both suit are exactly the same, which was based on the letter of acknowledgement against the first defendant and the letter of undertaking as against the second defendant. The subject

matter in the 1997 and the 2013 Suit are exactly the same ie the alleged outstanding sum of RM6,223,241 due under the said letter of acknowledgement except for the accruing interest claimed in the 2013 Suit.

[203] It is quite obvious that the facts and evidence adduced by the plaintiffs in the 2013 Suit are substantially similar to what was produced or adduced in the 1997 Suit. The issues raised by the plaintiffs in the 2013 Suit are also substantially the same with those that have been raised in the 1997 Suit.

[204] No doubt, 'new issues' were raised by the plaintiffs in the 2013 Suit, namely, that: (a) they are relieved of their obligations under the letter of acknowledgement upon the expiry of the set off period on account of self-induced frustration whereupon the defendants shall immediately become liable to value of the timber products; (b) the arrangement for payment of the outstanding debt based on the letter of acknowledgement is void or voidable; and (c) the plaintiffs should be compensated based on the principle of unjust enrichment. To the extent that any issues are to be considered as 'new' issues, then these are issues which could have been, but were not raised in the 1997 Suit. As such, such the so-called 'new' issues are also caught by the doctrine of res judicata in its wider sense (see *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494; [1986] 1 CLJ 548; [1986] 1 MLRA 131 (SC)).

[205] In the result, we do not agree with the judge that res judicata does not apply.

[206] In our view, res judicata applies in respect of the multitude of issues which had been raised in the 2013 Suit which are identical or bear a striking similarity to the issues which were raised in the 1997 Suit. And, in so far as the so-called new issues are concerned, those are barred by res judicata in the wider sense.

[207] As such, we take the view that the plaintiffs' claim in the 2013 Suit (save for the fresh order which has been held to be a sham) are based on claims or issues which had either been raised and/or which could have been, but were not raised in the 1997 Suit. In the circumstances, the filing of the 2013 Suit is a clear manifestation of litigation by instalment and is an abuse of process.

[208] As such, for the reasons as discussed above, we are impelled to the view that there is merit in the respondents' cross-appeal vis a vis the issue of limitation and res judicata. The cross-appeal is hereby allowed and consequently the plaintiffs' appeal is dismissed with costs of RM20,000 subject to allocator. In the result, the plaintiffs' claim in the High Court stands dismissed albeit on the grounds as stated above.

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Order accordingly.

Appeal dismissed and respondent's cross-appeal allowed.

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Reported by Ashok Kumar

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